

Home Rule Powers in Theory and Practice

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The notion that American municipalities have an inherent right to local self-government has never made more than slight inroads upon the strongly prevailing doctrine of legislative supremacy over local government.¹ Even that vigorous judicial champion of municipal home rule in Ohio, Judge Wanamaker, readily conceded that prior to November 15, 1912, the effective date of the so-called "Home Rule Amendment," legislative supremacy obtained in this state.²

The Ohio story of abuse of legislative power over municipal government has already been told in the pages of this number of the Journal.³ In 1902 the Supreme Court put an end to evasion of the constitutional ban upon special chartering of municipalities by resort to artificial classification based on population. During the ten years which followed, a well-chastened General Assembly showed no disposition to resort further to evasive tactics. It failed, however, to provide any flexibility in municipal governmental organization. The municipal code of 1902 provided but one form of government for municipalities of 5,000 or over and but one for those of less than 5,000. Urban leaders were no longer satisfied, moreover, to depend upon legislative grace for the authority to do

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¹McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 Col. L. Rev. 190, 299 (1916). The inherent right concept has been asserted most often with respect to the selection of local officers but it has cropped up in other situations. See *City of Lexington v. Thompson*, 113 Ky. 540, 68 S.W. 477 (1902) (statute fixing the pay of members of a city fire department declared invalid); *State of Montana ex rel. Kern v. Arnold*, 100 Mont. 346, 49 P. 2d 976 (1935) (statute requiring a three-platoon fire department invalidated).

There was an assertion of a vague transcendental concept of county self-government in *State ex rel. v. Commissioners*, 54 Ohio St. 333, 43 N.E. 587 (1896), but it was not necessary to the disposition of the case and found its only rational support in a widely-repudiated pronouncement by Judge Cooley.

²*State ex rel. Toledo v. Lynch*, 88 Ohio St. 71, 125, 131, 102 N.E. 670, 681, 683 (1913) (dissenting opinion).

³Walker, *Municipal Government in Ohio Before 1912*, 9 OHIO ST. L.J. 1 (1948).

whatever was deemed necessary in the conduct of what they considered local business. They wanted the legal situation reversed so that the municipalities would have all powers not denied instead of only those positively granted by the legislature.⁴

The upshot was a constitutional amendment which made a direct grant of substantive powers to municipalities and provided for three different methods of organizing municipal government: (1) incorporation and operation under a uniform general law, (2) local option under an optional charter law and (3) local framing and adoption of a home rule charter.

The constitutions of twenty-one states make some sort of provision for municipal home rule.⁵ Where the grant of charter-making powers comes directly from the constitution it is called constitutional home rule. Ohio and a number of other states are committed to constitutional home rule. If enabling legislation is necessary to render home rule powers available what we have is legislative home rule. Examples of this type are to be found in Michigan, Texas and West Virginia. Neither form gives positive assurance of genuine local autonomy. There may be more local responsibility and freedom of action under a devolution of authority from a liberally-disposed legislature than under a scheme of constitutional home rule. Much will depend upon the fate of the constitutional grant in the courts as well as the original scope of the grant.

The Ohio home rule pattern is distinctive in two conspicuous respects. Although Article XVIII classifies municipalities under 5,000 as villages and the rest as cities, home rule powers are granted to all municipalities alike, regardless of size.⁶ While it is true that

⁴See the remarks of Delegate Knight, 2 *Proceedings and Debates*, Ohio Constitutional Convention 1912, 1433 (hereinafter referred to as "*Debates*").

⁵ARIZ. CONST. Art. XIII, §§2 and 3; CALIF. CONST. Art. XI, §6 *et seq.*; COLO. CONST. Art. XX, §§1-6; LA. CONST. Art. XIV, §3(a) (As to East Baton Rouge Parish and the City of Baton Rouge only); MD. CONST. Art. XI A (as to Baltimore only); MICH. CONST. Art. VIII, §2 *et seq.*; MINN. CONST. Art. IV, §36; MO. CONST. Art. VI, §§19 and 20; NEB. CONST. Art. XI, §§2-5; NEV. CONST. Art. VIII, §8; N. Y. CONST. Art. IX, §§9, 11-13; OHIO CONST. Art. XVIII; OKLA. CONST. Art. XVIII, §§2-7; ORE. CONST. Art. XI, §§2 and 2-a; PA. CONST. Art. XV, §1; TEX. CONST. Art. XI, §5; UTAH CONST. Art. XI, §5; WASH. CONST. Art. XI, §§10 and 11; W. VA. CONST. Art. VI, §39-(a). A new Article XV, captioned "Home Rule," was made a part of the Georgia Constitution in 1945. Actually, it provides for optional charters, not home rule. Virginia has a procedure for local framing and adoption in any city of 50,000 or more of a special charter or form of government to be submitted to the General Assembly for its consideration. See VA. CONST. §117 and Va. Acts. 1946, c. 122. This is improved special chartering, not home rule.

⁶There are a few other states which set no population minimum. Among these are Minnesota, Oregon and the relatively recent convert, Utah.

metropolitan problems have come to the medium-sized city and thus have broadened the need for greater flexibility in both the organization and powers of municipal government, the larger urban centers have always been the strongholds of the home rule movement.⁷ Those centers have suffered most at the hands of the legislatures and, at the same time, they have had more complex special problems not readily dealt with under a system of uniform general laws. It is not without significance that only four of the more than 700 villages in Ohio have adopted home rule charters. All save Canton of Ohio's twelve largest cities, on the other hand, have exercised the power. A total of thirty-three of the 115 cities in the state have home rule charters. The need for this authority, at the village level, at least, is not apparent.

In Ohio substantive home rule powers are granted directly by the constitution to all municipalities and do not depend, for their realization, upon the adoption of a home rule charter. This does violence to that basic "axiom of home rule," as Professor McBain put it, "that the grant of substantive powers must not be separated from the adjective process prescribed for the exercise of such powers."⁸ The draftsmen of Article XVIII had not been clear on this point. Section 3 grants all powers of local self-government to "municipalities." Such powers doubtless embrace many things commonly placed in executive or administrative hands. The local legislative body was not the "municipality." Charter-making was the only process available for the "municipality" to determine who would exercise this or that power of local self-government. In view of these considerations it is not surprising that a majority of the Supreme Court, in the first case under the amendment, interpreted it to make the availability of substantive powers of local self-government depend upon the adoption of a home rule charter.⁹ This construction was not to survive. It was ignored in 1917 in a case involving a local police regulation, a matter obviously appropriate for action by the legislative body of the local unit as distinguished from its other agencies and officers.¹⁰ Six years later it was flatly rejected for the view, which has ever since prevailed, that the grant of Section 3 is direct and independent of charter-making.¹¹

⁷ So it was in Missouri, the cradle of home rule, when, in 1875, a constitutional provision, designed to free St. Louis from domination by the small town and rural interests in the legislature, was adopted.

⁸ MCBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 669 (1916).

⁹ *State ex rel. Toledo v. Lynch*, *supra* note 2.

¹⁰ *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917).

¹¹ *The Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595 (1923).

This brings us to a question of fundamental importance, which has never been decisively dealt with by the courts. If, upon the adoption of Article XVIII, all municipalities were immediately endowed with all powers of local self-government, was not the General Assembly simultaneously excluded from the area? In other words, was not local jurisdiction so far exclusive that the legislature could not occupy the field even though a particular municipality had not acted? A strong argument can be made for the exclusive jurisdiction theory. It can be said that the people organized the very state itself and that they could parcel out governmental power as between the state and municipalities as they saw fit. By giving the latter all powers of local self-government they saw fit to make each municipality, to that extent, an *imperium in imperio*. The practical consequences of applying that theory are, however, so serious that it is not to be accepted lightly. Any provision of the municipal code having to do with anything within the sweep of local self-government would simply be invalid. The state's numerous villages are wont to be guided by the statute law as they find it. The municipal code is the charter of those which have not adopted either an optional or a home rule charter. It would be quite too much to expect of every tiny village that it draw for itself the line marking the limits of "all powers of local self-government", when it is perfectly apparent that the General Assembly has not and could not reliably do so.

A possible key to the problem is, we believe, to be found in Section 2 of Article XVIII. It requires general laws for the incorporation and government of municipalities. Must we say that "government" was used narrowly to denote mere form or structure? Is it not less strained to assume that the term covers powers and procedures as well as structure? Certainly "self-government" in Section 3 embraces substantive powers. Under the normal home rule pattern envisioned by McBain substantive powers would be made available by charter-making. In Ohio, Sections 2 and 3 can be read together and the theory developed that the scheme of governmental structure, powers and procedure established under Section 2 would obtain in any municipality until departed from by an appropriate exercise of the home rule powers conferred by Sections 3 and 7.¹²

¹² Clearly, Article X, relating to county and township government, ties the availability of substantive home rule powers to charter-making. County "organization and government" must be provided for by general law and charter-making does not effect the realization of substantive powers unless it involves the vesting of municipal powers in a county. As used here it is perfectly plain that "government" embraces powers as well as structure and procedure. It should be noted that county home rule is a dead letter in Ohio. See *Howland v. Krause*, 130 Ohio St. 455, 200

As the home rule proposal originally appeared in the Convention, Section 3 read:

"Municipalities shall have the power to enact and enforce within their limits, such local police, sanitary and other similar regulations, as are not in conflict with general laws affecting the welfare of the state as a whole; and no such regulations shall by reason of requirements therein, in addition to those fixed by law, be deemed in conflict therewith unless the general assembly, by general law, affecting the welfare of the state as a whole, shall specifically deny all municipalities the right to act thereon."

The portion following the words "general laws" was stricken after much debate as to whether their presence would assure the municipalities greater authority in dealing with the liquor question.¹³ The proponents of home rule were unhappy over this action because they thought it left ultimate control in the legislature as to matters of local concern since laws general in form and application could be enacted on such subjects. Professor Knight, accordingly, offered an amendment which cast Section 3 into its present language except for a comma after "self-government." This was adopted. At that stage of the game Section 7 granted charter-making power subject to the limitation "but all such charters and powers shall be subject to general laws affecting the welfare of the state as a whole." Mr. Knight thought his amendment would put charter and non-charter units on a like footing but he significantly declared the effect would be to leave both with powers of local self-government "subject to general laws."¹⁴ In order to conform Section 7 more closely to the changed Section 3 Delegate Winn offered an amendment, which was adopted and which recast Section 7 into its present form. When the entire proposal was adopted the comma after "self-government" had somehow disappeared.¹⁵ Later Delegate FitzSimons offered an amendment to restore the comma on the ground that it would make it clearer that the "powers were entirely within the municipality."¹⁶ Mr. Winn opposed this amendment with the following significant argument:

"A few days ago, when this question was under discussion, I offered an amendment to section 7 broader in its scope and more liberal to the municipalities than anything that has been asked for by the author of the proposal or by its friends. That amendment was offered and agreed to and written into the proposal because in section 3 there

N.E. 512 (1936), discussed in 2 OHIO ST. L.J. 309 (1936) and by S. Gale Lowrie in *Interpretation of the County Home Rule Amendment by the Ohio Supreme Court*, 10 U. OF CIN. L. REV. 454 (1936).

¹³ 2 *Debates* 1463 *et seq.* The original section was attempted to be reproduced in full at only one point in the Debates. See 2 *Debates* 1465. The omission in that quotation of the words "are not in conflict with general laws affecting" may, with confidence, be taken as an inadvertence.

¹⁴ *Id.* at 1485.

¹⁵ *Id.* at 1496.

¹⁶ *Id.* at 1860.

was no comma after the word self-government. You see the importance of all this, so if we now insert a comma after the word "self-government" and thereby limit the right of municipalities by general laws to only such things as relate to local police, sanitary and other regulations, then we have in section 7 the same unrestricted right on the part of the municipalities to adopt a charter that was not intended. Such was not understood to be the sense of this Convention when the amendment to section 7, was offered and adopted. It ought not to be allowed now. I think that the members in favor of this proposal should have known before this section was presented that those who are opposed to it yielded, as we did a few days ago, simply because we believed there was left in it local self-government for municipalities limited only by the provisions of the general assembly or the lawmaking power. I move, therefore, that this amendment be laid on the table."

The motion to table prevailed. While Mr. Winn appears to have been mistaken in saying that there was no comma after "self-government" in Section 3 when he proposed an amendment to Section 7 a few days before, there is scant basis for doubt that the Convention accepted his argument here.

In its address to the people, which supported each proposed amendment with a brief explanation, the Convention ignored Section 3.¹⁷ It described the three ways a municipality could determine its form of government but said nothing about the substantive grants of Section 3. The published commentary of a contemporary writer, who strongly opposed the amendment, is particularly interesting at this point. He wrote:

"Section 7 provides that: 'Any municipality may frame and adopt or amend a charter for its government and may, *subject to the provisions of Section 3 of this article*, exercise thereunder all powers of local self-government.' Section 3 specifically states that: 'Municipalities shall have authority to exercise all powers of local self-government . . . *as are not in conflict with general laws*.' Therefore, the power granted in section 7 to 'frame and adopt or amend a charter' is a grant of power to *frame and adopt or amend a charter not in conflict with general laws*."¹⁸

There is a rather compelling point which supports this interpretation. If Section 7 were not so interpreted the words "subject to the provisions of Section 3 of this article" would be rendered meaningless for, unless that section's grant of powers of local self-government is qualified by the non-conflict clause, there would be no

¹⁷The Proceedings and Debates of the Convention do not show this part of the Address in final form. See 2 *Debates* 2052. It was reproduced on page 111 of a contemporary pamphlet, published by the Stoneman Press, Columbus, Ohio, and entitled "*Proposed Amendments to the Constitution of Ohio*."

¹⁸See the pamphlet cited in note 17, at p. 113.

limitation in Section 3 to which the quoted words could have reference. To say that the reference is to a limitation upon the second grant of Section 3 would do violence to the language used since Section 7 uses the wording of the first grant of Section 3.¹⁹ Section 3, moreover, is not to be read one way for charter municipalities and another for the rest.

Judge Wanamaker thought the first grant of Section 3 related to municipal power and was unlimited; that the second related to state power and was limited. "The second half," he said, "could not possibly relate to municipal power, because the first half is as comprehensive as a grant of power could be and therefore, no addition could be made to it."²⁰ This ignores both the considerations mentioned in the preceding paragraph and the improvisation indulged in casting Section 3 in its final form. The local self-government verbiage was an interpolation and it is far from plain that an unqualified grant of power was contemplated. Actually, moreover, the two grants do appear to overlap; surely some local police and sanitary regulations would, as an original matter, be said to lie within the ambit of local self-government. It is obvious that those who produced the original draft of Section 3 thought so.²¹

There is a familiar argument that unless the municipalities were made supreme in all matters of purely self-government "there would have been no purpose in adopting the amendment."²² This is to put the matter a little strongly. Professor Knight pointed out in the Convention that it was desired to reverse the prevailing rule that municipalities have only such powers as the legislature has devolved upon them, so that by direct constitutional grant they would have "the power to do those things which are not prohibited." Surely that would be a substantial purpose even though legislative supremacy were not broken.

¹⁹ In *State ex rel. Giovanello v. Village of Lowellville*, 139 Ohio St. 219, 39 N.E. 2d 527 (1942), Judge Williams assumed that the words "subject to the provisions of Section 3 of this article," which appear in Section 7, had reference to the limitations upon the second grant of Section 3. He did not explain how this could be when Section 7 speaks of powers of local self-government but does not mention local police, and the like, regulations.

²⁰ *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 362, 365, 103 N.E. 512, 518, 519 (1913).

²¹ See the original language of Section 3, quoted on page 22. In the cases we find attempts to explain the existence of the non-conflict clause as a limitation upon only the second grant of Section 3 on the ground that "local self-government" refers to matters of a "purely local nature" whereas police, sanitary and other regulations were not "purely" local matters. See *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 578, 53 N.E. 2d 501, 504 (1944).

²² See Williams, J., concurring in *State, ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 586, 587, 53 N.E. 2d 501, 507, 508 (1944).

While the courts have not always clearly observed the distinction, it is plain enough that the Supreme Court is committed to the view that the non-conflict clause qualifies only the second grant of Section 3.²³ The reader is asked to bear in mind that the discussion which follows is conditioned by this basic judicial approach to the subject.

Every attempt in the Convention to define home rule powers in such terms as "municipal affairs" met with defeat. The sponsoring delegates had been told about the unhappy history of the term "municipal affairs" in the interpretation of the California home rule provision.²⁴ They wanted to avoid vague language which would dump political problems as to allocation of governmental powers into the laps of the courts. Yet, with childlike faith, they uncritically seized upon the term "local self-government," language which is not one whit more helpful in marking the bounds of municipal authority. One can, of course, dig into the reports and see how the term has been applied in particular cases. We find, however, that this experience has enabled the courts to make no more helpful generalization than that the reference is to matters of a "purely local nature."²⁵ The word "purely" adds little, if anything. It does not convert grey into either black or white. As the expression of a broad political idea, either the California or the Ohio term carries considerable meaning, but, as a legal concept, "local self-government" is as lacking in sharpness of meaning, after thirty-five years of interpretation, as it was at the outset. It has been a fundamental difficulty with the home rule concept from the beginning that public affairs are not inherently either local or general in nature. This being so, it is mere self-deception to parade the old girl in a different dress.

When we come to the second grant of Section 3 we run afoul, at once, the terms "conflict" and "general laws." The obvious inquiry as to the latter is whether it refers to generality of application or of subject matter or both. In *Froelich v. City of Cleveland*,²⁶

²³ The confusion has arisen in the lower courts. Even in cases which have drawn heavy fire from devotees of home rule the Supreme Court has made it plain that the non-conflict clause does not qualify the first grant of Section 3. See *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 578, 53 N.E. 2d 501, 504 (1944).

²⁴ 2 *Debates* 1485, 1488. Concerning the California experience McBain very aptly quoted the following language from an opinion of Judge McFarland of the California Supreme Court: "The section of the constitution in question uses the loose, indefinable, wild words municipal affairs, and imposes upon the court the almost impossible duty of saying what they mean." *Ex parte Braun*, 141 Cal. 204, 213, 214, 74 Pac. 780, 784 (1903); quoted in McBAIN, *THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE* 279 (1916).

²⁵ See note 21 *supra*.

²⁶ 99 Ohio St. 376, 124 N.E. 212 (1919).

the Supreme Court declared, in substance, that general laws are those which apply uniformly throughout the state and that they are enactments which are of general concern to the state as a whole. It was not made clear that these were two dependent elements in a single definition. Since, as we have already seen, the Convention struck out a clause which would have expressly written the second meaning into the section, "general laws" should be taken to refer simply to measures general in application.²⁷ If, on the other hand, the word "local" was used in Section 3 in the sense of application it would be redundant because municipal regulations would necessarily be local in operative effect.

The prevailing test of "conflict" was spelled out in the case of *Village of Struthers v. Sokol*.²⁸ In that case the court adopted the "head-on clash" theory. Conflict exists when "the ordinance declares something to be right which the state law declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other."²⁹ Mere inconsistency is not enough. Such a formula is difficult to apply in many situations, and, as we shall see, there have been cases in which it appeared that the principle itself was shaken, if not abandoned.

A statute placing limitations upon municipal powers may be a law of general application but, with the possible exception of the borrowing power,³⁰ the grants of Section 3 cannot be defeated that

²⁷ "In Section 3, Article XVIII of the Constitution, which empowers municipalities to adopt and enforce within their limits such local police, sanitary and other similar regulations as are not in conflict with general laws, the words 'general laws' refer to laws passed by the legislature which are of general application throughout the state." Paragraph 2 of the syllabus in *Leis v. The Cleveland Railway Co.*, 101 Ohio St. 162, 128 N.E. 73 (1920).

²⁸ 108 Ohio St. 263, 140 N.E. 519 (1923). The cases down to 1942 are discussed by Hitchcock, *Ohio Ordinances in Conflict with General Laws*, 16 U. OF CIN. L. REV. 1 (1942).

²⁹ *Village of Struthers v. Sokol*, 108 Ohio St. 263, 268, 140 N.E. 519, 521 (1923).

³⁰ Section 13 of Article XVIII authorizes the enactment of laws limiting the power of municipalities to levy taxes and incur debts. Prior to 1912 the ground had been covered by Section 6, Article XIII. That Section was not repealed; the home rule grant was new and the draftsmen merely chose the course of putting another tax and debt limit provision in the Home Rule Amendment. That it was deemed necessary to confer this authority on the General Assembly in express terms suggests strongly that Section 3 devolved taxing and borrowing power upon municipalities.

way. True "conflict" arises when the legislature has legislated directly on the subject, not when it merely forbids municipal action.³¹

GOVERNMENTAL STRUCTURE

Home rule powers are conferred upon municipalities. That means municipal corporations already duly incorporated. Original incorporation under a home rule charter is not possible. The scheme of Article XVIII is that a municipality shall be brought into being under general law. Once *in esse* it may continue with the form of organization provided by the general law (municipal code), or it may, by local option, shift to any one of several forms made available by an optional charter law,³² or it may frame and adopt a home rule charter. An optional charter municipality may adopt a home rule charter but the converse is not true. Once a home rule charter has been adopted it can be amended as provided in Article XVIII but the municipality cannot thereafter shift under the statute to an optional plan.³³

The Home Rule Amendment deals expressly with charter-making and amendment but is silent as to the repeal or abolition of a charter. The Constitution does reserve to the people of each municipality the initiative and referendum powers on questions which the municipality might then or thereafter be authorized by law to control by legislative action.³⁴ It would be rather anomalous if home rule went so far as to permit adoption or amendment of a charter but stopped short of permitting return to a pre-charter status. The court, accordingly, in *Youngstown v. Cräver*,³⁵ quite frankly was "casting about" for a rationalization, when it upheld resort to initiative and referendum as a means of abandoning a

power. Assuming that matters of procedure in borrowing money to finance a city hall, for example, were within the realm of local self-government, on what basis could the General Assembly claim the final word except as to procedure calculated to implement a tax or debt limitation? This distinction was clearly recognized in *State ex rel. Hile v. Cleveland*, 26 Ohio App. 265, 160 N.E. 241 (1927).

General statutes governing special assessment proceedings have been held to override conflicting charter provisions on authority of Section 6, Article XIII, of the Constitution. *State ex rel. Osborne v. Williams*, 111 Ohio St. 400, 145 N.E. 542 (1924); *Berry v. City of Columbus*, 104 Ohio St. 607, 136 N.E. 824 (1922).

With respect to the issuance of general obligation municipal bonds to finance municipal public utilities see *State ex rel. Toledo v. Weiler*, 101 Ohio St. 123, 128 N.E. 88 (1920).

³¹ See *City of Youngstown v. Evans*, 121 Ohio St. 342, 168 N.E. 844 (1929); *City of Fremont v. Keating*, 96 Ohio St. 468, 118 N.E. 114 (1917).

³² OHIO GEN. CODE §3515-1 *et seq.*

³³ *Switzer v. State ex rel. Silvey*, 103 Ohio St. 306, 133 N.E. 552 (1921).

³⁴ OHIO CONST. Art. II, §1f.

³⁵ 127 Ohio St. 195, 187 N.E. 715 (1933).

charter in favor of pre-charter government. The unanswered question whether charter abolition, a local organic act, is a matter a municipality is authorized by law to control by legislative action is troublesome, but one is likely to look sympathetically upon the result achieved.

The constitutional classification of municipalities by population into cities (5,000 or more) and villages (less than 5,000) is definitive and exclusive. The General Assembly may not effect further classification for any purpose.³⁶ This perpetuates a pattern established by the municipal code adopted in 1902. The code makes provision for incorporation of villages, but takes no cognizance of the exceptional case of a community of 5,000 or over.³⁷

Under Section 7 of Article XVIII "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Since Section 3 is considered self-executing it has been declared that "... a municipality in adopting a charter as authorized by Section 7 is merely exercising a permissive authority of local self-government conferred upon all municipalities by section 3 . . ."³⁸ It is clear that a home rule charter cannot enlarge municipal powers. So far as substantive powers are concerned its function is primarily, if not exclusively, distributive. Whether such powers can actually be limited or cut down by a home rule charter is an inquiry pursued elsewhere in this issue of the Journal.³⁹

³⁶ *City of Mansfield v. Endly*, 38 Ohio App. 528 (1931), *aff'd* 124 Ohio St. 652 (1931); *City of Elyria v. Vandemark*, 100 Ohio St. 365, 126 N.E. 314 (1919).

³⁷ OHIO GEN. CODE §3516 *et seq.* Unincorporated communities with population far in excess of 5,000 exist in the United States. Kannapolis, N.C., has 20,000 or more people.

³⁸ *State ex rel. Arey v. Sherrill*, 142 Ohio St. 574, 580, 53 N.E. 2d 501, 504 (1944). If this were strictly true would not Section 7 be superfluous?

³⁹ Comment, 9 OHIO ST. L.J. 121 (1948).

Some home rule charters purport expressly to render the general laws of the state, present and future, governing municipal corporations, applicable to the charter cities concerned insofar as there is no conflict. Is the effect to leave a given municipality with less power than is granted by Section 3, Article XVIII, if the statutes so incorporated by reference grant less authority than does Section 3? The Court of Appeals for Lawrence County assumed in the opinion in a recent case, as yet unreported, that home rule powers might be constricted in this way, although it was concerned merely with the manner of exercise of a municipal power. *Hugger v. City of Ironton* (decided Aug. 17, 1947); *appeal dismissed for want of a debatable constitutional question*, 148 Ohio St. 670 (1948). The court's answer to the point that a municipality could not cut down a direct constitutional grant was that such power as was denied or taken away could as readily be restored by charter amendment. Counsel wanted to be advised how there could be incorporation by reference of general laws on

It seems safe to say here that the main function of charter-making in Ohio is the fashioning of governmental organization. There is wide freedom of choice in erecting the executive, administrative and legislative framework. It is elementary that separation of powers does not apply to municipal government. It is doubtful even that the doctrine of non-delegability of legislative power would apply, since Section 7 is unqualified in this respect. When it comes to the court structure, however, we find that home rule power is practically nil.

Courts

Section 1 of Article IV, Constitution of Ohio, reads, "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, courts of probate, and such other courts inferior to the courts of appeals as may from time to time be established by law."

In *State ex rel. Cherrington v. Hutsinpillar*,⁴⁰ the court held that the attempt of the city of Gallipolis to create a municipal court by its charter was beyond the power of the municipality. The city argued that its action was within the scope of Section 3, Article XVIII, granting to municipalities authority to exercise all powers of local self-government, but the court replied that "A power so extraordinary and vital should not rest upon any less foundation than express grant or clear and necessary implication and we find neither in the Constitution. . . . Section 1, Article IV, is a special provision of the Constitution that has to do with the creation of courts, and as such supersedes the general power of local self-government, as granted in Section 3, Article XVIII."⁴¹ The phrase in Section 1, Article IV, "as may from time to time be established by law" was interpreted to mean law passed by the general assembly of the state. Thus, in the matter of the creation of courts we would seem to be in an area of exclusive state jurisdiction. The common legislative practice is to create particular municipal courts for the large cities by special acts. The uniformity requirement of Section 26 of Article II is not considered applicable.⁴² With respect

matters of local self-government since, under the exclusive jurisdiction theory, there could be no valid laws of that sort to be incorporated in a charter. The court did not discuss the point. It is not clear, in any event, how future statutes could be incorporated presently by reference. Would that not involve an ineffective attempt at abdication of municipal power? Section 232 of the charter of the City of Columbus obviates the problem of charter amendment suggested here by incorporating only such general laws as were not in conflict with the charter or with ordinances or resolutions thereafter adopted.

⁴⁰ 112 Ohio St. 468, 147 N.E. 647 (1925).

⁴¹ *Id.* at 473, 474, 147 N.E. at 649.

⁴² OHIO GEN. CODE §1558-1 *et seq.* Apparently the uniformity objection

to the judicial establishment we are, thus, no further away from the evils of special legislation affecting municipal government than we were a century ago.

Four years after the *Hutsinpillar* decision the case of *State ex rel. Ramey v. Davis*⁴³ presented a question as to maintenance of a municipal court, which had been created by special act of the general assembly.⁴⁴ The statute required the council of the city of Toledo to "provide suitable accommodations for the municipal court and its officers, including a private room for each judge and sufficient jury room," to "provide for the use of the court complete sets of the reports of the Supreme and inferior courts of the state and such other books as the judges of the municipal court may from time to time deem necessary," and "to provide for each court room the latest edition of the General Code of Ohio, and necessary supplies, including telephones, stationery, furniture, books, typewriters, heat, light and janitor service." The city councilmen refused to comply and the incumbent judges of the newly-created court sought a writ of mandamus to compel the county commissioners to provide a place for housing the court. The theory was that the court being a state court, and the county an agency of the state, the county, not the self-governing municipality, was the proper governmental unit to carry out the state's mandate. The writ was denied. The court reasoned that "Power to create a court carries with it the power to define its jurisdiction and to provide for its maintenance."

A unanimous court, speaking through Judge Robinson, declared, "By the adoption of Section 3 of Article XVIII the state did not cede the territory of the municipalities to other sovereigns, but only surrendered to the inhabitants of such territory the sovereign right to locally govern themselves, and as to all sovereign powers not thus surrendered, the sovereignty of the state over such territory remained supreme. . . ."⁴⁵ Under our system of government sovereignty rests in the people, and when the people speak through the Constitution they are organizing the state for political purposes. The constitution does not surrender but devolves or delegates powers.⁴⁶ It is believed that Judge Johnson was nearer the mark, when in writing the opinion of the court in the case of *Fitzgerald*

was not even raised in the leading case of *State ex rel. Fox v. Yeatman*, 89 Ohio St. 44, 105 N.E. 74 (1913).

⁴³ 119 Ohio St. 596, 165 N.E. 298 (1929).

⁴⁴ OHIO GEN. CODE §1579-276 *et seq.*

⁴⁵ *State ex rel. Ramey v. Davis*, 119 Ohio St. 596, 599, 165 N.E. 298, 300 (1929).

⁴⁶ See OHIO CONST. Art. I, §20 ". . . all powers not herein delegated remain with the people." It is elementary American constitutional theory that state legislatures have plenary power except as limited. The quoted clause is interesting in that connection.

v. *Cleveland*,⁴⁷ he declared: "There has been a new distribution of governmental power. The distribution has been made by the people."

This, however, does not impeach the decision in the *Ramey* case. The fact that the people have given municipalities powers of local self-government does not mean that they cannot be employed by the state, as before, in matters within state jurisdiction.

Police and Fire Departments

These departments, by force of a series of Supreme Court decisions, occupy a unique position in the governmental structure of municipalities. Under the decisions of the Court in *Cincinnati v. Gamble*,⁴⁸ *State ex rel. Arey v. Sherrill*,⁴⁹ *State ex rel. O'Driscoll v. Cull*,⁵⁰ and *State ex rel. Strain v. Houston*,⁵¹ it has become established law that both police and fire protection are matters of state-wide concern "and under the control of state sovereignty."⁵² Thus, we again encounter an area of state supremacy.

In the *Gamble* case, which involved the legality of a city retirement system set up by Cincinnati for its policemen and firemen in lieu of that contemplated by statute, the court invoked the familiar conception that a municipality operates in a dual capacity—for itself in the conduct of its own particular business, and as an agent of the state, in local administration of state affairs. Said Judge Williams for the Court, "As to one function, a city or village exercises the powers of local self-government within imposed limitations, and, as to the other, acts as an arm or agency of the sovereign state."⁵³ Fire and police protection being matters of state-wide concern, the municipalities act in relation thereto as arms of the state, and the state being the principal may in the exercise of its sovereignty impose duties and responsibilities upon them as its agencies.

Judge Williams took it as previously settled in Ohio that police protection was an object of state concern. He relied upon a passage in the opinion in a tort case which declared that a municipality engaged in police protection is performing a governmental function with respect to which it enjoys the sovereign immunity of the state.⁵⁴ The case actually arose out of street repair operations. So

⁴⁷ 88 Ohio St. 338, 360, 103 N.E. 512, 518 (1913).

⁴⁸ 138 Ohio St. 220, 34 N.E. 2d 226 (1941).

⁴⁹ 142 Ohio St. 574, 53 N.E. 2d 501 (1944).

⁵⁰ 138 Ohio St. 516, 37 N.E. 2d 49 (1941).

⁵¹ 138 Ohio St. 203, 34 N.E. 2d 219 (1941).

⁵² *Cincinnati v. Gamble*, 138 Ohio St. 220, 34 N.E. 2d 226 (1941), paragraph 4 of syllabus.

⁵³ *Id.* at 227, 34 N.E. 2d at 230.

⁵⁴ *City of Wooster v. Arbenz*, 116 Ohio St. 281, 284, 156 N.E. 210, 211 (1927).

far, moreover, as the specious "governmental versus proprietary" test, employed in tort actions against municipalities, is concerned, a particular activity might well be labeled governmental even though the function was local. Certainly that was true of the street repair work involved in the very case cited. More to the point, but not mentioned, was the following paragraph in a *per curiam* opinion in a 1923 case:

"The matter of the appointment of police officers is purely a matter of local self-government, and while the mayor of a city may be called to account for the conduct of such officers, of which he has knowledge, he may not be removed from office by reason of the past history or general character of such appointees."⁵⁵

It was apparently the assumption of the majority in the *Gamble* case that all aspects of police protection as administered by a municipality are state business. The opinion came close to saying that state jurisdiction is exclusive. There was no suggestion that there might be local autonomy in organization, personnel and administration subject only to state requirements and standards as to character and extent of service and quality of performance. The point was made that if a police department is a "purely" municipal matter it could be abolished and the state would be unable to prevent it. But could there not be a middle ground? Granted that police protection is not purely municipal, it can with as much force be urged that the function is not purely a state concern. Under a home rule set-up is it not reasonable to make the distinction suggested above?

If, of course, we are talking about an area of state power quite outside the reach of Article XVIII, it is idle to dwell upon the meaning of "local police, sanitary and other similar regulations." It is fairly clear that Judge Williams would not have accorded them a breadth of meaning which would embrace organizational and administrative provisions as well as local regulation of the conduct of the citizenry, or which would be as wide as the police power. He spoke to the point three years later in a concurring opinion in the *Sherrill* case. There he said that the intent was to use the term "regulations" in the sense of "municipal legislative acts which make an act an offense and prescribe a penalty" and thus to preserve the pre-home rule status of state and municipal jurisdictions as to misdemeanors.⁵⁶

In a cryptic dissenting opinion in the *Gamble* case Judge Turner put the subject of police retirement funds in the local self-government province, "At least until such time as the state, by

⁵⁵ State *ex rel.* Vogt v. Donahey, 108 Ohio St. 440, 445, 140 N.E. 609, 611 (1923).

⁵⁶ See State *ex rel.* Arey v. Sherrill, 141 Ohio St. 574, 587, 53 N.E. 2d 501, 507, 508 (1944).

general laws, shall take over the police and fire departments of the state (municipalities?), the employees of such departments are municipal employees, and their employment, discharge, organization, pay, pension, etc., remain matters of local self-government."⁵⁷ He did not elaborate. His theory appears to be that the state could take over police protection entirely but that so long as municipalities are left with responsibility in the field they can have the final say as to organization, personnel and administration.

The *Cull* and *Gamble* cases were both decided May 7, 1941, and the *Houston* case later that year. In the *Cull* case a Cleveland civil service requirement that an applicant for the position of patrolman have a high school education fell before a statutory prohibition on "educational requirements as a condition of taking a civil service examination." The *Houston* case involved a successful attack upon Cincinnati's departure from a statute so regulating the hours of labor of firemen as to increase their time off and the payroll burden of the city without providing additional revenue to meet the expense. Judge Hart spoke for the majority in both cases. While he, too, placed both fire and police protection in the state-concern category, he also stressed conflict with general laws. This leaves us in some confusion. The state-concern idea is the basis for a complete theory in itself. It opens an area of state jurisdiction beyond the reach of Section 3 of Article XVIII. Even if we attempt to apply the second clause of Section 3, it seems not a little strained to put civil service requirements or provision for a platoon system for firemen in the "local police, sanitary and other similar regulations" category.

It must be rather ironical to Ohio devotees of home rule that in at least two states, where there is no provision for constitutional home rule, legislation designed to control municipal discretion as to such matters as the pay of policemen and the work program of firemen has been knocked out with no better juristic weapon than the discredited notion that there is an inherent right to local self-government.⁵⁸

The most recent decision involving police departments was the *Sherrill* case. A Cincinnati patrolman was charged with certain violations of police department rules and ordered to appear before the city manager, who intended to hear and determine the charges by virtue of a grant of authority in the city charter to "appoint,

⁵⁷ See *Cincinnati v. Gamble*, 138 Ohio St. 220, 232, 34 N.E. 2d 266, 232 (1941).

⁵⁸ *City of Lexington v. Thompson*, 113 Ky. 540, 68 S.W. 477 (1902); *State of Montana ex rel. Kern v. Arnold*, 100 Mont. 346, 49 P. 2d 97 (1935). It is to be noted, however, that the majority view in the home rule states accords with that of Ohio. See *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W. 2d 613 (1942), and note 141 A.L.R. 903, 904 (1942).

and . . . dismiss, suspend, and discipline all officers and employees in the administrative service under his control." The defendant sought a writ of prohibition to stop the city manager from hearing the charges on the ground that under Section 4368, General Code, the director of public safety "shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments (police and fire), except as otherwise provided by law." By subsequent sections the director of public safety is given power to hear and determine charges made against policemen and firemen and to inflict such punishment as is justified under the facts in each particular case.

The court, speaking through Judge Bell, held that the charter was in conflict with the provisions of the General Code and yielded thereto. The court reiterated that "matters pertaining to a police department are of state-wide concern" and added that municipalities, charter or otherwise, are without authority to adopt regulations in respect thereto which are in conflict with general law. A very significant point was made that even though "the police department of a city is a matter of state-wide concern (this) does } not prevent the city from adopting any regulation in reference thereto so long as such regulation does not conflict with general laws." Despite the talk of conflict with general laws this power to act in an area of state concern does not appear to derive from either grant of Section 3 of Article XVIII, since the court had already laid it down that the first grant embraced only matters of a purely local nature. Judge Bell does not fully explain it. Judge Williams, the author of the majority opinion in the *Gamble* case, undertook to do so in a concurring opinion. He wrote: "A consideration of the above-quoted constitutional provisions (speaking of Sections 3 and 7, Article XVIII) naturally divides itself into three heads: (1) local police, sanitary and other similar regulations; (2) powers of local self-government where such regulations are not involved; (3) the power or authority of the municipality to act in matters of state-wide concern."⁵⁹ As to the third, he declared that when the state does not invade or pre-empt the field the municipality, of necessity, may act voluntarily. But why "necessarily"? The legislature is free, if it chooses, to devolve authority upon a local arm, such as a municipality, in order to get state business done.

Health Departments

It was long since decided that the legislature had authority to create health districts throughout the state and to impose the bur-

⁵⁹ See *State ex rel. Arey v. Sherrill*, 142 Ohio St., 574, 586, 53 N.E. 2d 501, 507 (1944).

den of contributing tax funds thereto upon cities and villages.⁶⁰ Said the court: "we think it clear that when the legislature in the exercise of the general legislative power conferred by Section 1, Article II, of the Constitution, has adopted general laws providing sanitary and other similar regulations, such legislation is effective throughout the state."⁶¹ There was no problem of "conflict" in this case. The state was exercising positive control regardless of municipal action.

*City of Bucyrus v. State Department of Health*⁶² involved review of an order of the State Department of Health, issued to the city of Bucyrus, to install works or means, satisfactory to the director of health, for collecting and disposing of the sewage of the city in a manner calculated to correct and prevent the pollution of the Sandusky River by such sewage.

The court, in affirming the order, pointed out that "The surrender of the sovereignty of the state to the municipalities by [Article XVIII] was a partial surrender only, and, with reference to sanitary regulations, was expressly limited to such sovereignty as the state itself had not or thereafter has not exercised by the enactment of general laws."⁶³ Here again the situation was not one of conflict of a local sanitary regulation with general law. The legislature, through an administrative agency acting under general law, was compelling a municipality to take affirmative steps to remove a health hazard. Legislative power does not appear to stop short of this; the area is one of legislative supremacy and state action may be directed against local units of government as well as individuals to achieve the purpose.

The *Bucyrus* case heralded the emergence of the state-wide concern concept. "It is a matter of concern to the whole state whether a municipality so dispose of its sewage as to breed disease within the municipality."⁶⁴ The court did not, however, suggest that health protection was within an area of power outside Section 3, Article XVIII. There is express authority under Section 3, Article XVIII, to enact local sanitary and other similar regulations not in conflict with general laws. Regulation of collection and removal of garbage, for example, plainly falls within the scope of the granted power.⁶⁵

⁶⁰ *State ex rel. Village of Cuyahoga Heights v. Zangerle*, 103 Ohio St. 566, 134 N.E. 686 (1921).

⁶¹ *Id.* at 577, 134 N.E. at 690.

⁶² 120 Ohio St. 426, 166 N.E. 370 (1929); *accord*, *State ex rel. Neal v. Williams*, 120 Ohio St. 432, 166 N.E. 377 (1929).

⁶³ *City of Bucyrus v. State Department of Health*, 120 Ohio St. 426, 427, 166 N.E. 370 (1929).

⁶⁴ *Id.* at 428, 166 N.E. at 371.

⁶⁵ *State ex rel. Moock v. Cincinnati*, 120 Ohio St. 500, 166 N.E. 583

The latest chapter in the history of "municipal" health departments in the state was written in *State ex rel. Mowrer v. Underwood*,⁶⁶ a case involving the selection of candidates for various positions in the department of public health of the city of Akron. The city charter provided for the creation and appointment of a health commission and a director of public health. The charter also contained civil service provisions for employees of the health department. A taxpayer sought mandamus upon behalf of the city to compel the city personnel director and civil service commission to comply with the civil service sections of the charter by preparing an eligibility list of employees and to comply with the civil service sections of the charter and to compel the city director for public health and the health commission to make appointments from lists so prepared to fill vacancies in the public health department.

Section 1261-16, General Code, reads in part: "For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district and for the purposes of this act shall be known as and hereinafter referred to as a city health district." Section 4404, General Code, provides that "The Council of each city constituting a city health district, shall establish a board of health. . . ." In dividing the state into health districts, the General Assembly, in the same act, repealed the then existing statutes which authorized municipalities to establish and appoint boards of health within their local governments. This measure, known as the Griswold Act, struck from the Hughes Act, the basic health district measure, the provisions which placed the employees of health districts under civil service.

The court held that the statute withdrew previously granted powers of local health administration from the municipalities, created in each city a health district which was a separate political subdivision of the state, independent of the city with which it was coterminous, and delegated to it the health powers withdrawn from the municipality. This was squared with home rule on the theory that Article XVIII did not surrender the sovereign power of the state to protect the public health. Health protection was, in short, a matter of state-wide concern. Finally, it was stated that in striking out the civil service provisions of the Hughes Act the legislature thereby clearly manifested an intent that employees of the health district were to be exempt from civil service requirements, and, therefore, the civil service requirements in the city charter did not apply.

(1929); *City of Canton v. Van Voorhis*, 61 Ohio App. 419, 22 N.E. 2d 651 (1939).

⁶⁶ 137 Ohio St. 1, 27 N.E. 2d 773 (1940).

There was a proviso in the statute purporting to preserve to a municipality constituting a health district authority to provide by charter for health administration "other than as in this section provided." This was interpreted to permit charter provisions supplementing the health district scheme but not an administrative pattern "different from" it. The legislature, it was asserted, could not possibly have used the expression "other than" in the latter sense. It seems to the writers, however, that the very use of a proviso, as well as the words "other than," is more in keeping with the idea of a variation than of supplementation. The General Assembly, at its next session, confirmed this by so revising the section as to call for the administrative set-up provided by the act unless an administration of public health service "different from" that provided in the act had been established and maintained under a municipal charter prior to the effective date of the act.⁶⁷

To recur, however, to the home rule question in the case, one is struck by the broad implications of the court's reasoning. The statute was upheld as a withdrawal of health powers from municipalities. It so happens that the board of health of a city health district is appointed by the mayor and confirmed by the council and that the mayor serves as its president. This is not a matter of legal necessity. Since the district is considered a state agency it would appear that its organization might be entirely independent of the city. Furthermore, municipal power to pass health regulations might, for all that appears, be transferred *in toto* to this state agency.

The logic of the fire, police and health cases is that the legislature could provide by general law for separate and independent *ad hoc* units of government, coterminous with municipalities, to take over fire, police, and health functions as arms of the state and to the exclusion of the municipalities. This is, indeed, a startling result. In the realm of organization and administration it greatly constricts the first grant of Section 3 of Article XVIII. With respect to police and health regulations under the police power it means that the General Assembly may take away what the constitution has given by the second grant of Section 3.

Conservancy Districts and Other Special Function or Ad Hoc Units

One of the leading cases under this heading is *Miami County v. Dayton*,⁶⁸ which involved the validity of a state law creating conservancy districts for flood control purposes.⁶⁹ The city of Dayton protested the imposition of the three-tenths mill levy under the statute on the ground that such an act was an invasion of the city's

⁶⁷ OHIO GEN. CODE §4404, as amended by 119 Ohio Laws 551, § 1 (1941).

⁶⁸ 92 Ohio St. 215, 110 N.E. 726 (1915).

⁶⁹ 104 Ohio Laws 13 *et seq.*, OHIO GEN. CODE §6828-1 *et seq.*

constitutional power granted by Section 3, Article XVIII. The court held that creation of conservation districts was an exercise of the state police power as granted to the legislature in Article II, Section 36, which reads in part: "Laws may also be passed . . . to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts."

Speaking of the home rule provisions of the constitution, the court said, "The doctrine in no wise applies to the creation of drainage or conservation districts, where the power to be exercised is peculiarly a state power, the sovereign police power. It has always been recognized as peculiarly the function of the states."⁷⁰ Reliance was placed also on the fact that a conservancy district might overlap a number of counties, townships and municipalities. The case could easily have been decided on the basis of constitutional construction alone, since both Article II, Section 36, and Article XVIII, Section 3 were adopted on the same day. The former is a specific grant of power to the legislature which would take precedence over the general grant to municipalities made by the latter.

Where there is a specific constitutional grant of power to the state to establish certain districts and provide legislation for the regulation thereof, the problem is somewhat simplified. But where the state establishes such a district without express constitutional authority resort must be had to general principles. It is safe to say that the legislature may provide for *ad hoc* units of government to perform this or that function. The rub comes, however, when the effect of the use of the device is to oust municipalities of their powers of local self-government. On the other hand, where a governmental problem is no respecter of corporate limits or for other reasons cannot be met by the exertion of municipal powers it is not evident that the legislature is powerless to create appropriate *ad hoc* governmental units for the purpose and devolve upon them the powers needed to do the job. Such would appear to be the case with public housing authorities whose objects are slum clearance and provision of housing for people of small income.⁷¹

PERSONNEL

It was early declared, in *State ex rel. Frankenstein v. Hillenbrand*,⁷² that "whatever difficulty this court may have encountered in accurately designating the subjects comprehended in 'local self-

⁷⁰ *Miami County v. Dayton*, 92 Ohio St. 215, 236, 110 N.E. 726, 732 (1915).

⁷¹ The Housing Authority Law deliberately provides for the establishment of metropolitan housing authorities only in a portion of a county comprising all or portions of two or more subdivisions. OHIO GEN. CODE §1078-30.

⁷² 100 Ohio St. 339, 343, 126 N.E. 309, 310 (1919).

government,' as contra-distinguished from 'local police, sanitary and other similar regulations,' it has had no difficulty in arriving at the conclusion that the qualification, duties and manner of selection of officers, purely municipal, come within the purview of the provision granting a city 'local self-government.' " A significant practical aspect of this case was the holding that the first officers under a new charter could be voted upon at the same election as the charter itself.

Civil Service

¶ It will be remembered that Section 10 of Article XV of the constitution requires the merit system in the state, county and city civil service. This does not apply to villages.⁷³ Soon after the Home Rule Amendment was adopted it was held that a home rule charter provision for a civil service commission, which complied with Section 10 of Article XV, prevailed over the general statute on the theory that regulation of city civil service was within the powers of local self-government.⁷⁴ In 1928 home rule power as to civil service was sustained in a case involving a city civil service regulation, inconsistent with statute, under which one was rendered eligible for appointment as chief of police on the basis of faithful service although he had not passed a civil service examination.⁷⁵ In 1941 the Supreme Court reached a directly opposite result as to police department personnel without mention of the 1928 case.⁷⁶ A city civil service commission requirement that applicants for positions as patrolmen be high school graduates was found to be in conflict with the general statute and the latter was given controlling effect on the ground that police protection is a matter of statewide concern. The court has decided, as we have seen, that fire and health protection are also state concerns and, thus, state civil service provisions would govern in those areas. This statewide concern concept as applied to police, fire and health protection has already received extended comment in the discussion of governmental structure. It seems fairly evident that such a notion had to be employed if the court was to get away, in these areas, from its original broad position that regulation of the civil service of a city is an exercise of a power of local self-government. While the "state-concern" concept was not plainly isolated in the majority opinion in the *Cull* case, but was tied to the "non-conflict" clause of Section 3, Judge Turner made it clear enough, in a dissenting

⁷³ *State ex rel. Giovanello v. Village of Lowellville*, 139 Ohio St. 219, 39 N.E. 2d 527 (1942). But why could not a village provide for civil service by home rule charter quite apart from Article XV, since, as we shall see, regulation of city civil service is considered a home rule matter?

⁷⁴ *State ex rel. Lentz v. Edwards*, 90 Ohio St. 305, 107 N.E. 768 (1914).

⁷⁵ *Hile v. Cleveland*, 118 Ohio St. 99, 160 N.E. 621 (1928).

⁷⁶ *State ex rel. O'Driscoll v. Cull*, 138 Ohio St. 516, 37 N.E. 2d 49 (1941).

opinion, that civil service regulation did not fall under the second grant of Section 3 of Article XVIII, since it was neither a police, sanitary nor similar regulation.⁷⁷

A special act of the legislature establishing a municipal court in Akron made the tenure of the bailiffs, deputy bailiffs, deputy clerks, cashiers, and stenographers of the court subject to the pleasure of the appointing power. The Akron charter placed all these positions in the classified service. The Court of Appeals, in *Underwood v. Isham*,⁷⁸ decided that the statute governed. The result is in keeping with the principle of the *Hutsinpillar* case⁷⁹ but the opinion expresses misconceptions which leave it rather more confusing than helpful. Thus, it was asserted that about the only change made by the home rule amendment was to make the validity of municipal action depend upon whether there was a statute preempting the field to the exclusion of the municipality. This does not consist with the Supreme Court's long-established interpretation that a municipality is supreme in the domain of local self-government.

The mayor of a municipality is usually the chief law enforcement officer. Thus, he is a key figure in police protection. All would agree that his office is largely, if not fully, within the domain of local self-government. Yet, wherein is his function as chief conservator of the peace any the less a subject of state concern than the position of chief of police? Since his functions are not purely municipal why do not the fire and police protection cases logically sweep his office into the ample domain of state-wide concerns?

In *State ex rel. Daly v. Toledo*,⁸⁰ an ordinance of the city of Toledo provided for compulsory retirement of members of the police and fire divisions at the age of 65 years. Section 486-17a, General Code, contained a provision making tenure of officers under the act dependent upon "good behavior and efficient service," and providing that removal should be only for inefficiency, neglect of duty and similar reasons. The court found that there was a conflict between the ordinance and statute and held that the latter prevailed. The court failed to identify the grant of power in Section 3, Article XVIII, to which they were referring, but the language used is appropriate to the second grant of power. Perhaps "conflict" was not being used in the Section 3 sense; under the court's view, that fire protection is a state concern, the statute would govern independently of Section 3 of Article XVIII.

⁷⁷ *Id.* at 521, 523, 37 N.E. 2d at 52, 53. It has to do with public organization and administration and does not control private conduct.

⁷⁸ 61 Ohio App. 129, 22 N.E. 2d 468 (1939).

⁷⁹ *State ex rel. Cherrington v. Hutsinpillar*, 112 Ohio St. 468, 147 N.E. 647 (1925).

⁸⁰ 142 Ohio St. 123, 50 N.E. 2d 338 (1943).

Contemporary problems of labor relations have cropped up in municipal employment. *Hagerman v. Dayton*⁸¹ was a declaratory judgment proceeding instituted by the Director of Finance of Dayton to determine the validity of an ordinance providing for a check-off on the wages or salary of certain civil service employees of the city, who belonged to a union and who had assented to the arrangement. Section 6346-13, General Code, provides that an assignment of wages or salary is invalid, unless there is a contract "between the employers and their employes, or as between employers, employes, and any labor union as to any check-off on the wages of such employes as may be agreed upon."

The court held that municipal corporations were not "employers" within the meaning of 6346-13 and that civil service appointees are not "employes" under that section. The ordinance was classed as a police regulation and thus was overridden by Section 6346-13. Thus, the prohibition of that Section was applied to municipal employees while the exception was not. It was concluded, moreover, that the ordinance was in conflict with "the spirit and purpose of the civil service laws of the state." The opinion went further; it declared broadly that in view of the provisions of the constitution and statutes on civil service, unions have "no function which they may discharge in connection with civil service appointees." It is not at all clear that the civil service laws cover the whole ground.⁸² Might not such matters as pleasant working conditions be put forward by union action, be it only by a petition and not on the basis of an asserted right to collective bargaining?

If the check-off ordinance was a local police regulation, any municipal measure concerning the terms or conditions of employment of municipal personnel might as readily be put in the same category. All affect human welfare. Municipal provision for a cost-of-living salary bonus would be a local police regulation. So would an ordinance creating an employees' welfare fund to be fed by salary deductions or otherwise.

Judge Zimmerman, in a concurring opinion, preferred to rest on the theory that the ordinance under consideration did not accomplish a governmental, public or municipal purpose, but was an *ultra vires* attempt to promote the private interests of a nonpublic organization.⁸³ On this basis deductions under a private hospitali-

⁸¹ 147 Ohio St. 313, 71 N.E. 2d 246 (1947).

⁸² It is worthy of note that the Dayton Charter, Section 93 *et seq.*, regulates civil service. It would seem that a discussion of the scope of civil service regulations applicable to Dayton should direct attention to the governing charter provisions.

⁸³ In Maryland the legality of a municipal check-off at the instance of individual employees has been sustained. *Mugford v. Mayor and City Council of Baltimore*, 185 Md. 266, 44 A. 2d 745 (1946). (Baltimore is a home-rule city.)

zation plan might be in jeopardy. In either case, the members support a group arrangement they consider beneficial to them as individuals. This rationalization does, however, avoid some of the debatable points presented in the principal opinion.

The Attorney General has expressed the opinion that the applicable state civil service laws apply until a municipality has made provisions in its charter to implement Section 10 of Article XV.⁸⁴ It is true that the *Lentz* case,⁸⁵ in which it was first held that local civil service matters were under powers of local self-government, involved a situation in which the city had adopted a charter. However, the statements in that case were also broad enough to include non-charter municipalities. Furthermore, the *Lentz* case was decided before the court definitely decided that Section 3, Article XVIII, is self-executing. The crux of the matter is the relation of civil service to governmental organization. Does Section 7 relate merely to the "bare bones" of governmental structure or does charter-making embrace the fashioning of governmental organization in a full-blown sense? The former interpretation is not compelled by the use of the word "government" in Section 7 and it is open to the objection that it would both materially narrow popular participation in home rule by placing wide authority over organization primarily in local legislative hands and would render charter-making all the more formalistic.

Since, as we have seen, municipalities have no power to create courts or regulate the administration of justice, state law is supreme as to judicial review of administrative action in civil service matters.⁸⁶

Qualifications of Electors

In 1917 the case of *State ex rel. Taylor v. French*⁸⁷ reached the Supreme Court of Ohio. The charter of East Cleveland provided that women should have the right to vote for all municipal elective officers and to hold any municipal office. At that time the Ohio Constitution, Section 1, Article V, contained the provision that "every white male citizen . . . of the age of twenty-one years . . . shall be entitled to vote at all elections." The court upheld the charter provision as a valid exercise of a power of local self-government. The court was careful to point out, however, that a municipality could not "confer upon women the right to vote for, or exercise any of the functions of, an officer created by the Constitution or by the General Assembly." Section 1 of Article V con-

⁸⁴ 1941 OPS. ATT'Y GEN. (Ohio) No. 3846, citing *State ex rel. Jackson v. Dayton City Commission*, 30 Ohio L. Abs. 378 (Ohio App. 1939).

⁸⁵ 90 Ohio St. 305, 107 N.E. 768 (1914).

⁸⁶ *In re Fortune*, 138 Ohio St. 385, 35 N.E. 2d 442 (1941).

⁸⁷ 96 Ohio St. 172, 117 N.E. 173 (1917).

trolled in all elections held to fill offices which the constitution itself provided for, but not those to fill offices created by a city charter.

The court mentioned the fact that counsel for the defendants conceded that "it may well be that the power to prescribe the qualifications of electors for the purpose of all local elections is accurately classified as one of the powers of local self-government," but did not expressly approve or disapprove of this thought. In view of the holding in the *Frankenstein* case,⁸⁸ it seems reasonable to say that the power to prescribe qualifications of electors for the purpose of all municipal elections is a power of local self-government.

Nominations, Appointments and Elections

Municipalities may not prescribe the manner or method of conducting elections for county and state officers.⁸⁹ The mere fact that as a matter of convenience these elections are at times conducted concurrently with municipal elections does not enlarge the jurisdiction of the municipality nor extend its power beyond its own territorial limits. It is plain enough from the cases, however, that municipalities are authorized under Section 3 of Article XVIII to determine the selection of municipal officers, which shall be appointed and which elected, the method of nomination and the manner of conducting elections for municipal officers.

In the leading case of *Fritzgeald v. Cleveland*,⁹⁰ the problem arose as to the power of a municipality, by home rule charter, to abolish nomination by direct primary, to provide for nomination by petition and to abolish the party mark or emblem on the ballot. Section 7 of Article V of the constitution provides, in part, that "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law. . . ." The majority, in upholding the charter provision, harmonized the pertinent provisions of Articles V and XVIII by treating the subject as within the sweep of powers of local self-government and interpreting "law," as used in Section 7 of Article V, broadly to include a home rule charter as well as a statute. The three dissenting judges, speaking through Judge Donahue, insisted that "law" referred unambiguously and simply to statute law.⁹¹

⁸⁸ *State ex rel. Frankenstein v. Hillenbrand*, 100 Ohio St. 339, 126 N.E. 309 (1919).

⁸⁹ *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 168 N.E. 131 (1929).

⁹⁰ 88 Ohio St. 338, 103 N.E. 512 (1913).

⁹¹ As Judge Jones later pointed out in *Village of Brewster v. Hill*, 128 Ohio St. 354, 191 N.E. 366 (1934), the word "law" or "laws" was employed repeatedly in the 1912 amendments and this, he thought, disclosed, on the

A municipality may make provision in its charter for proportional representation. Whether to employ that system of voting is a choice within the domain of local self-government.⁹² Section 1 of Article V of the constitution gives one with the qualifications of an elector the right "to vote at all elections" but that is not interpreted to mean that he is entitled to vote separately and specifically for a nominee for each office.⁹³

While it is beyond the power of a municipality to create a court in Ohio, a home rule charter may provide that the president of the council may exercise the judicial powers of a mayor conferred by general law.⁹⁴ Except for interim appointments all judgeships in Ohio are made strictly elective by Article IV. Thus, a home rule charter could not validly provide for the selection of an officer, such as a mayor or council president, who would exercise judicial powers conferred by statute, except by election.

A home rule charter provided that candidates for an elective office should be nominated only by petition, which was not to be signed by any elector more than 60 days prior to the day of the election and which was to be filed with the election officials not less than 40 days previous to the day of the election. Section 4785-92, General Code, required that "Nominating petitions of candidates shall be filed with the same election authority as is provided for the filing of declaration of candidacy not later than 6:30 p.m. on the sixtieth day prior to the date of election." Five candidates for judge of the police court filed under the charter. Prohibition was sought to prevent the board of elections from placing their names on the ballot.⁹⁵

The court held that the judge of a municipal police court is a municipal officer even though the court itself was created by state statute and that, under the grant of all powers of local self-government, a municipality has power to determine the manner of selection of municipal officers (which in the case of judges means

whole, a pretty clear intention to refer to legislative enactments only. The *Brewster* case involved an ordinance but a charter would not appear to be on any different footing for present purposes. The *Brewster* case was, in a sense, a blow to home rule, because the court there decided that Section 2, Article IV, of the constitution, which requires the concurrence of at least all but one of the judges of the Supreme Court to declare a law unconstitutional, did not apply to municipal ordinances.

⁹² *Reutener v. City of Cleveland*, 107 Ohio St. 117, 141 N.E. 27 (1923).

⁹³ In *State ex rel. v. Constantine*, 42 Ohio St. 437 (1884), the court laid it down that each elector is entitled to vote for a candidate for each office to be filled. The majority in the *Reutener* case thought this an unwarranted extension of the plain language of Section 1, Article V, but thought that the Home Rule Amendment governed in any event. Thus, the *Constantine* case was not overruled. Judge Robinson dissented.

⁹⁴ *Ide v. State*, 95 Ohio St. 224, 116 N.E. 450 (1917).

⁹⁵ *State ex rel. Stanley v. Bernon*, 127 Ohio St. 204, 187 N.E. 733 (1933).

election and no other method of selection). Therefore, the city ordinance controlled the nomination of the candidates and the petitions were valid. This decision provides quite a contrast with the police, fire and health administration cases.

Salaries and Other Incidents of Office or Employment

With the possible exception of policemen, firemen and other municipal officers and employees engaged in functions of "state-wide concern," it may safely be laid down that the salaries of municipal officers and employees are a matter of local self-government.

Section 4209, General Code, provided that councilmen of cities of 25,000 or less should not receive salaries in excess of \$150 per year, with a rising salary scale for each additional 30,000 inhabitants. The city of Mansfield had paid salaries to its councilmen in accordance with the scale set forth in a city ordinance, but which was higher than the scale provided in Section 4209. The city brought action to recover the amount of the alleged overpayments.⁹⁶

The court determined that Section 4209 was in conflict with Section 1 of Article XVIII of the constitution since it attempted a classification of cities and villages different from that made by the constitution. While this disposed of the case the court proceeded to say, obiter, the amount of money a city pays to its councilmen is purely a municipal matter and within "powers of local self-government." The ordinance prevailed and the salary payments were sustained.

Matters pertaining to the employment of secretarial assistance, apart from civil service factors in villages and non-charter cities, provision for offices, purchases of supplies, hiring of consultants, and the like, would seem to fall under the heading of powers of local self-government. They involve a minimum of state interest.

Removal of Municipal Officers

In a concurring opinion Judge Wanamaker was emboldened to list certain matters which he thought resided, without question, in the domain of "all powers of local self-government."⁹⁷ One of these was the recall of municipal officers. Many home rule charters doubtless have recall provisions. Considered alone, Article XVIII would easily sustain Judge Wanamaker's conclusion. It should be considered, however, with Section 38 of Article II, which reads: "Laws shall be passed providing for the prompt removal from office, upon complaint and hearing, of all officers, including state officers, judges and members of the general assembly, for any mis-

⁹⁶ *City of Mansfield v. Endly*, 38 Ohio App. 528, 176 N.E. 462 (1931), *aff'd.*, 124 Ohio St. 652, 181 N.E. 886 (1931).

⁹⁷ See *Fitzgerald v. Cleveland*, 88 Ohio St. 338, 362, 366, 103 N.E. 512, 518, 519 (1913).

conduct involving moral turpitude or for other cause provided by law; and this method of removal shall be in addition to impeachment or other method of removal authorized by the constitution." In a recent Court of Appeals case the municipal code provision for recall was declared unconstitutional on the theory that the quoted section applies to municipal officers and exacts the procedure of complaint and hearing in all cases.⁹⁸ If this is true of a statute governing a non-charter municipality why would it not also apply to a recall provision of a home rule charter on the theory that Section 38, Article II, would rule the general terms of Article XVIII?⁹⁹ The soundness of the Court of Appeals' interpretation may, however, be questioned, as an original proposition. Section 38 of Article II is addressed to removal for cause. The recall is a political process, which may be employed without relation to grounds for removal in any ordinary legal sense.

PROCEDURE

Is the adoption of rules of legislative and administrative procedure within the grant of all powers of local self-government? If the primary power being exercised is itself within that grant, one would suppose that the ancillary business of the manner of its exercise would likewise be covered. Certainly, we entertain no doubt that for most purposes the organization and procedure of a municipal legislative body may be determined by home rule charter or by the body itself under charter authority.¹⁰⁰ It seems to have been assumed in the past that the general statutes would govern non-charter municipalities in these matters. It is not evident why this must be so as to either legislative or administrative procedure. In a recent Court of Appeals case, the issue was squarely met and determined in favor of municipal autonomy.¹⁰¹ The City of Ironton sold unused land to the Federal Government for a nominal price without complying with Section 3699, General Code, which requires public sale on competitive bidding. It was held that both the power and procedure of sale were matters within the grant of all powers of local self-government.

⁹⁸ State *ex rel.* Burnett v. Ducey, 44 N.E. 2d 803 (Ohio App. 1942).

⁹⁹ It may be seriously doubted that home rule charters would be deemed "laws" within the meaning of Section 38, Article II. There is a dictum in Village of Brewster v. Hill, 128 Ohio St. 354, 357, 191 N.E. 366, 367 (1934), to the effect that "laws" refers to legislative enactments only.

¹⁰⁰ State *ex rel.* Bateman v. Zachritz, 135 Ohio St. 580, 22 N.E. 2d 84 (1939). (Charter prescribed two-thirds vote to override planning commission.); State *ex rel.* Hile v. Cleveland, 26 Ohio App. 265, 160 N.E. 241 (1927). (Charter provision as to publication of ordinances prevailed over OHIO GEN. CODE §4228).

¹⁰¹ Hugger v. City of Ironton (Court of Apps. of Lawrence County, decided Aug. 17, 1947, and not yet reported); *appeal dismissed for want of a debatable constitutional question*, 148 Ohio St. 670 (1947).

SUBSTANTIVE HOME RULE POWERS

Thus far we have been concerned largely with structure and personnel. It is time to give attention to substantive home rule powers. Perhaps the best approach in that area is to focus upon particular governmental functions. In that way one should be able to get a rather realistic view of home rule in action. It would be rather artificial and quite repetitious to deal first with the grant of all powers of local self-government in Section 3 and then treat of the power to adopt police, and the like, regulations.

Protection of Public Morals

We may as well begin with liquor and beer regulations. It is in that area that the leading case in Ohio defining "conflict" with general laws, *Village of Struthers v. Sokol*,¹⁰² arose. In that case certain city ordinances, prohibiting the manufacture and sale of intoxicating liquor as a beverage, made some acts crimes that were not so by statute and also in at least one instance the penalty imposed by ordinance was greater than that imposed by statute covering the same offense. It was determined that the municipalities concerned had authority under the second grant of Section 3 to legislate on the subject despite the existence of the prohibition clause of Section 9 of Article XV (since repealed). That left the question of conflict with general laws. The court declared that "no real conflict can exist unless the ordinance declare something to be right which the state law declares to be wrong, or vice versa. There can be no conflict unless one authority grants a permit or license to do an act which is forbidden or prohibited by the other."¹⁰³ It is not enough that the ordinance is more stringent than the statute. Under this definition, the court found that there was no technical "conflict" between the ordinances, which definitely fell into the category of local police regulations, and the state statutes. The ordinances and statutes merely differed in certain respects, but the statutes did not prohibit something which the ordinances allowed, or the converse. Nor was the double jeopardy objection deemed valid. The same act may, at once, be a misdemeanor under both a statute and an ordinance.

The argument that the legislature, in controlling certain phases of the liquor problem, intended by implication that all other acts connected therewith should not be controlled, was rejected by the court. Thus, conflict by negative implication was not allowed to arise. As long as the statute said nothing, it meant nothing.

Closing hours for liquor and beer dispensing establishments have given rise to several interesting decisions. In *City of Coshocton*

¹⁰² 108 Ohio St. 263, 140 N.E. 519 (1923).

¹⁰³ *Id.* at 268, 140 N.E. at 521.

*v. Saba*¹⁰⁴ there was an asserted clash between a regulation of the State Liquor Board providing that "No intoxicating liquor may be sold or permitted to be consumed on week days on the premises of D-3 permit holders between the hours of 12:30 a.m. and 5:30 a.m." and a city ordinance prohibiting the sale of such beverages between the hours of 10:00 p.m. and 5:00 a.m. and all day on Sunday. It was held that, even though it be conceded that the regulation of the Liquor Board was a general law, still there was no "conflict" between the ordinance and the regulation. The now familiar argument that the ordinance prohibited something, which, by implication, was allowed by the "general law," viz., the sale and consumption of intoxicating liquor on week days from 10:00 p.m. to 12:00 a.m., was rejected. A like fate was met by the contention that since the legislature expressly permitted municipal prohibition of all sales of "intoxicating liquor" on Sundays regardless of the regulations of the Board¹⁰⁵ the rule, *expressio unius est exclusio alterius*, should be invoked to establish that no other departure from the state scheme was in order. The court simply held that if the statute or regulations said nothing, it meant nothing.

*Akron v. Scalera*¹⁰⁶ presented an almost identical problem as that in the *Saba* case with like results. A city ordinance prohibited the sale of beer on Sunday. Section 6064-22, General Code, prohibited the sale of beer to persons under 18 years of age, but said nothing else concerning the regulation thereof. The court held that the ordinance was a local police regulation and that no conflict was present "merely because certain specific acts made unlawful by ordinance are not referred to in any general law." The argument that the state intended to take over the whole field by setting up some regulations as to beer was again rejected.

Section 6064-17, General Code, provided that "not more than one Class D-3, Class D-4, Class D-5 permit shall be issued for each two thousand population, or part thereof, in any county, city or village." A city ordinance provided that such permits "within the corporate limits of the city of East Cleveland, shall be limited to one for every thirty-five hundred (3500) of the population of the city of East Cleveland, as shown by the latest federal census." In a proceeding by a D-3 permit holder to compel the city manager to issue him a license it was decided that the local police regulation was in conflict with a general law and, therefore, invalid. The case looks a great deal like an instance of conflict based on implication. Both measures were couched in negative language; the ordinance was the more stringent. Only by interpreting the

¹⁰⁴ 55 Ohio App. 40, 8 N.E. 2d 572 (1936).

¹⁰⁵ OHIO GEN. CODE §6064-22.

¹⁰⁶ 135 Ohio St. 65, N.E. 2d 279 (1939).

statute as permissive can the test of conflict in the *Sokol case*¹⁰⁷ be met.

Another closing hours case which reached the supreme court was *Neil House Hotel Co. v. City of Columbus*.¹⁰⁸ An ordinance of the city of Columbus made it an offense to sell or serve beer and intoxicating liquors on the premises of a permit holder after midnight of any day. General Code Section 6064-22, provided that "No sale of intoxicating liquor shall be made after 2:30 a.m. on Sunday," and that "Nothing in this section shall prevent a municipal corporation or village from adopting an earlier closing hour for the sale of intoxicating liquor on Sunday or to provide that no intoxicating liquor may be sold on Sunday."

Section 6064-15, General Code, provides that the holder of a D-3a permit who also holds D-1 and D-2 permits may sell beer and intoxicating liquor after the hour of 1:00 a.m. and during the same hours as the holder of a D-5 permit. The statute is silent as to the hours under a D-5 permit. It remained for administrative action to fill the gap. The Board of Liquor Control was authorized by Section 6064-3(i), General Code to regulate the hours during which intoxicating liquor might be sold. The Board adopted Regulation No. 30, which prohibited the sale and consumption of beer and intoxicating liquors on the premises of a D-3a or D-5 permit holder between the hours of 2:30 a.m. and 5:30 a.m. The Neil House held D-1, D-2, D-3 and D-3a permits. It prayed a declaratory judgment invalidating the ordinance insofar as it proscribed sales after midnight on its premises as a permit holder and sought an injunction against enforcement of the ordinance in this respect. Plaintiff won both in the Court of Appeals and in the Supreme Court.

The majority concluded that there was conflict with a general law. In adopting Regulation No. 30, the Board was acting as an administrative agency of the legislature and it was "in effect, the voice of the General Assembly heard through an agency of its creation." Thus, the regulation was treated as a "general law" within the meaning of Section 3, Article XVIII.

The rationalization of "conflict" is the significant feature of the case. "When the statutes and a valid regulation of the Board of Liquor Control say that the sale of intoxicants may not be made after a designated hour, it is equivalent to saying that sales up to that time are lawful, and an ordinance which attempts to restrict sales beyond an earlier hour is in conflict therewith and must yield."¹⁰⁹ This is a clear example of conflict by implication, which

¹⁰⁷ *Village of Struthers v. Sokol*, 108 Ohio St. 263, 140 N.E. 519 (1923).

¹⁰⁸ 144 Ohio St. 248, 58 N.E. 2d 665 (1944); discussed in 14 U. OF CHI. L. REV. 297 (1947). Chief Justice Weygandt and Judges Hart and Williams dissented.

¹⁰⁹ 144 Ohio St. 248, 253, 58 N.E. 2d 665, 668 (1944).

was rejected in the *Saba case*.¹¹⁰ This case was certified to the Supreme Court because the Court of Appeals found the judgment rendered to be in conflict with that of a sister court in the *Saba case*. The authority of the latter has, it appears, been pretty well dissipated.

An attempt was made to distinguish *Akron v. Scalera*,¹¹¹ by simply stating that "the implications" of the *Scalera case* "are that if a municipal ordinance of the type here involved is in collision with a general law upon the same subject, the ordinance is ineffective." It is true that the *Scalera case* contains some statements that might give strength to the court's contention. For example, "Our attention is not directed to any rule or regulation adopted by the Board of Liquor Control with reference to the sale of beer on Sunday." From this one might imply that had some regulation been made on the subject, the court would have found a conflict by implication.

Taken literally, Section 6064-15, General Code, authorized a D-3a permit holder to do business until at least 1:00 a.m. The Board regulation, however, did not, in terms, authorize anything. Thus, while it can be urged with some force that the statute expressly authorized sale during an hour covered by a municipal prohibition there is also basis for the interpretation that affirmative authorization was no more intended here than elsewhere in the act under provisions merely forbidding sale after certain hours.

It is not intended here to embrace the thesis that there could never be a proper basis for making out conflict by implication. The point is that such an implication is not lightly to be drawn, that it should be impelled as a matter of sound statutory interpretation in the particular case. Otherwise, by a loose resort to the device, the *Sokol* test might be enervated and home rule powers in the area of police, sanitary and other similar regulation be considerably weakened. It was frequently stated during the course of the debates in the constitutional convention that Article XVIII was intended to vest municipalities with all powers not denied, which was the converse of the situation which had hitherto prevailed. Defeat of these powers by conflict based on implication is not lightly to be accepted.

The problem of conflict with general laws was involved in two well-known nisi prius cases concerning the motion pictures, "The Birth of a Nation" and "The Birth of a Baby." In *Epoch Producing Co. v. Davis*¹¹² it was sought to enjoin the mayor of the city of Cleveland from preventing the showing in that municipality of the

¹¹⁰ *City of Coshocton v. Saba*, 55 Ohio App. 40, 8 N.E. 2d 572 (1936).

¹¹¹ 135 Ohio St. 65, 19 N.E. 2d 279 (1939).

¹¹² 19 Ohio N. P. (N.S.) 465, 62 Week. L. Bul. 225 (1916).

movie "Birth of a Nation." The Board of Film Censorship had issued to the owners of the rights in the film a certificate of censorship stating that the film was of a moral, educational and harmless character. The mayor claimed that, under a provision in the city charter granting him full power and authority, as conservator of the peace, to supervise the administration of the affairs of the municipality and see that the ordinances were enforced, he was exercising a valid home rule power in prohibiting the exhibition of the picture in Cleveland, since the movie was calculated to excite and create a breach of peace contrary to a city ordinance.

Former Section 871-46(3),¹¹³ General Code, provided that "Only such films as are, in the judgment and discretion of the Board of Censors, of a moral, educational or amusing and harmless character shall be passed and approved by the board." The statute made it a misdemeanor to exhibit an unapproved motion picture in Ohio.

Since the board had jurisdiction and since, as was clearly provided in the statute, the only method of review of the Board's action was in the Supreme Court of Ohio, the court had no standing to review the action of the board. The question was—did board action control the mayor? Judge Foran concluded that it did. The legislature, he thought, had placed the power of censorship in a state body and thereby the power was "forbidden to municipalities acting under home rule charters." He had no doubt that in the absence of any state law in relation to censorship, a city acting under a home rule charter could, by ordinance, provide for censoring plays and theatrical exhibitions. While the court was, thus, employing a theory of state pre-emption, the result can be sustained under the non-conflict clause. The mayor was trying to ban an exhibition allowed by the state censors under a general law. Twenty years later, a similar case, which arose in Cincinnati, was determined on just that basis.¹¹⁴

An ordinance of the city of Cincinnati attempted to confer upon the city manager the power to license exhibitions, amusements, and other forms of entertainment held in theaters, concert halls, and similar places within the city. The ordinance further provided that "if at any time, in the opinion of said city manager, the performance, entertainment or exhibition given in such place is immoral, indecent, or injurious to the public welfare or morals, then the city manager shall have the power to revoke said license."

¹¹³ The Administrative Code abolished the Board of Censors of Motion Picture Films which operated under the supervision of the Industrial Commission and transferred its powers and functions to a division of film censorship in the Department of Education. OHIO GEN. CODE §§ 154-6, 154-26, 154-47.

¹¹⁴ *American Committee on Maternal Welfare v. Cincinnati*, 26 Ohio L. Abs. 533, 11 Ohio Op. 366 (1938).

The city manager was enjoined from stopping the showing of "The Birth of a Baby." If it be assumed that the ordinance authorized the action of the city manager, it would be in conflict with the statute since it was a local police regulation which forbade what the statute allowed, *viz.*, the exhibition of the film.

Regulation of the business of exhibiting movies, which does not amount in substance to a prohibition of exhibition, is another matter. That a picture had been passed by the censors would hardly preclude a municipality from setting a closing hour or banning Sunday movies. The supreme court has dismissed, as not involving a debatable constitutional question, the appeal of a case in which the court below had upheld the validity of a municipal ordinance which prohibited the showing of any motion pictures on Sunday.¹¹⁵ Section 13049, General Code, prohibited the exhibition of movies on Sunday in the forenoon. Nor would conflict appear to be made out where the potential audience was cut down by an ordinance forbidding attendance by children, unless, perhaps, the movie was one specially designed for children.

Control of Streets and Traffic

The Supreme Court assumed, in *Froelich v. Cleveland*,¹¹⁶ that "the location, vacation, extension, widening, curbing, guttering, paving, maintenance and control of streets" were powers of local self-government. It proceeded to uphold a conviction under an ordinance which set a maximum weight of ten tons for loads carried on city streets, although the maximum fixed by statute was twelve tons. That was in 1919. By treating the ordinance as a matter of administrative management instead of a local police regulation, the court was able to disregard the question of the existence of a "conflict" with general laws. The court was thinking of the city's burden of constructing and maintaining streets.¹¹⁷ Heavy loads, however, affect the security and freedom of traffic as well as the physical condition of the street. Why, moreover, is a penal ordinance aimed solely at the protection of the city's economic interest in a public way not a local police regulation? Would not a measure prohibiting the defacing of public buildings fall in that category? If, on the other hand, "general laws" has to do with enactments of general concern instead of general application, the ordinance might yet prevail. As to this, the opinion seems to support both interpretations all in one paragraph.¹¹⁸

One of the first cases to find that a local police regulation

¹¹⁵ *Cambridge v. Elliott*, 135 Ohio St. 576, 21 N.E. 2d 669 (1939).

¹¹⁶ 99 Ohio St. 376, 384, 124 N.E. 212, 214 (1919).

¹¹⁷ A clearer case is that where a municipality forbids the operation, upon its streets, of vehicles equipped with cleats or spikes. *Wilson v. Springfield*, 105 Ohio St. 647, 138 N.E. 927 (1922).

¹¹⁸ See 99 Ohio St. 376, 386, 124 N.E. 212, 215 (1919).

governing speed of vehicles on the streets of the municipality was a valid exercise of municipal power under Section 3, Article XVIII, was *City of Fremont v. Keating*.¹¹⁹ In that case the defendant appealed from a conviction under a city ordinance, which forbade operation of a vehicle at a greater speed than eight miles per hour in the business or closely built-up portions of the city, or fifteen miles an hour in any other portion of the city. Section 12604, General Code, set the exact speed limitations contained in the ordinance. Violation of the statute was punishable by fine and of the ordinance by fine and imprisonment. Section 6307, General Code, provided that local authorities should not regulate the speed of motor vehicles by ordinance, by-law, or resolution. The conviction was reversed on the ground that the defendant was entitled to trial by jury since imprisonment might be part of the punishment. Since he had not waived jury trial he was improperly convicted.

The court's treatment of the authority of the city to regulate speed was significant, although not essential to the decision of the case. It amounted to this: Section 3 of Article XVIII directly granted the power and the existence of state regulations did not prevent its exercise so long as there was no conflict. The legislature could not defeat it by simply forbidding its exercise. The statute was not a regulation in itself but merely a limitation upon municipal regulation. The speed regulations prescribed by the ordinance were identical with those of the statute and, thus, there was no conflict.

Speed regulations have since presented real "conflict" difficulties. *Schneidermann v. Sesanstein*¹²⁰ was a civil action for personal injuries resulting from the alleged negligent operation of a motor vehicle upon the streets of the city of Akron by the defendant. The accident occurred in a school zone. An ordinance of the city set a speed limit of fifteen miles per hour for vehicles approaching a school building during school hours. Section 12603, General Code, made operation of a motor vehicle upon a road or highway at a speed greater than was reasonable and proper a misdemeanor. A rate of speed greater than fifteen miles an hour in the business or closely built-up portions of a municipal corporation or more than twenty-five miles an hour in other portions was made *prima facie* evidence of a rate of speed greater than is reasonable and proper. Section 12608, General Code, provided that "The provisions of section twelve thousand six hundred and three shall not be diminished, restricted or prohibited by an ordinance, rule or regulation of a municipality or other public authority."

¹¹⁹ 96 Ohio St. 468, 118 N.E. 114 (1917).

¹²⁰ 121 Ohio St. 80, 167 N.E. 158 (1929). The companion case of *Eshner v. City of Lakewood*, 121 Ohio St. 106, 166 N.E. 904 (1929) is in accord. Judges Day and Allen dissented in both cases.

The court in finding that this was a local police regulation in conflict with general laws relied primarily upon the theory of a conflict by negative implication. Said the court, "when the law of the state provides that a rate of speed greater than a rate therein specified shall be unlawful, it is equivalent to stating that driving at a less rate of speed shall not be a violation of law; and therefore an ordinance of a municipality which attempts to make unlawful a rate of speed which the state by general law has stamped as lawful would be in conflict therewith." What clinched the matter, however, was Section 12608. "A local regulation certainly is in conflict with a general law covering the same subject if it attempts to prohibit that which the statute has expressly provided shall not be 'diminished, restricted or prohibited.'"¹²¹ Section 12608 was far from clear. How could the "provisions" of a statute be diminished, restricted or prohibited? The court thought the Section forbade municipal regulation more drastic than that contained in the statute. On that basis would the statute not be a limitation of municipal home rule power rather than a true regulation, unless we are to say flatly that there was a conflict because the effect of the statute was to permit speeds over fifteen miles per hour where reasonable and proper under the circumstances? Would Section 12608 be not prohibitory implementation of state pre-emption of the field? Under the potent pre-emption shield the state may enact legislation on a particular matter and then say to the municipalities of Ohio, "We have taken over the whole field; therefore, you are powerless to enact legislation in the area." It is seriously doubted that the framers of Section 3, Article XVIII, intended that municipal power in matters of police, sanitary and similar regulations should be so limited.

The problem in the *Sesanstein* case was somewhat alleviated by the amending of Section 12603, General Code, to make it "prima facie lawful" to drive at speeds not exceeding those set forth in the statute. Then, in 1941, both 12603 and 12608 were repealed so that today it would seem that municipalities have effective authority to enact speed regulations.

*Schwartz v. Badila*¹²² arose after the amendments to Section 12603, but before the repeal of 12603 and 12608. In that case a city ordinance tracked the specific limitations set up in the statute, but added, "any speed which is inconsistent with the absolute safety of pedestrians and other vehicular traffic by reason of weather conditions, highway conditions, congestion of traffic, or any cause whatsoever, shall be considered prima facie evidence of reckless driving."

¹²¹ *Id.* at 86-87, 167 N.E. at 160.

¹²² 133 Ohio St. 441, 14 N.E. 2d 609 (1938).

The court decided that this was a local police regulation in conflict with general laws. Since, under the statute it was made *prima facie* lawful to operate a motor vehicle at a speed not exceeding the rate specified and the ordinance made it *prima facie* unlawful, conflict was considered obvious. There was a clash between the ordinance and statute only when the operator of a motor vehicle drove within the statutory speed limits, which speed was *prima facie* lawful, but in such a manner as to cause the speed to be inconsistent with the absolute safety of pedestrians and other vehicular traffic which was *prima facie* unlawful under the ordinance. In other words, it was possible under certain circumstances for the same rate of speed to be *prima facie* unlawful under the ordinance and *prima facie* lawful under the statute. Conflict was not inevitable. The ordinance did not flatly prohibit anything that was allowed by the statute. The most that could be held against the ordinance was that it shifted the burden of going forward with the evidence, or, perhaps, the burden of proof.

Especially interesting in a study of powers of Ohio municipalities are the cases dealing with regulation of the use of streets by public carriers. The leading case upon this subject is *Village of Perrysburg v. Ridgway*.¹²³ An ordinance of the village prohibited motor busses from starting or stopping within the municipal limits, although the ordinance did not in any way prohibit the use of the streets for through traffic. The case was a statutory taxpayer's suit to enjoin enforcement of the ordinance. The Supreme Court, by a bare four-to-three vote, upheld the ordinance. The majority considered it a valid exercise of a power of local self-government. The dissenters saw the measure as a police regulation which affected the people and commerce of the state as a whole and which discriminated arbitrarily against the village's own people. It must be obvious that the exercise of home rule powers is subject to such constitutional limitations as the due process and equal protection of the laws clauses of the Fourteenth Amendment.

It is going pretty far to say in the motor vehicle age that local self-government carries to the point that a village may prevent interurban common carriers from stopping their vehicles within its limits. Judge Jones insisted in his *Perrysburg* dissent that the majority's position was "a reversion to the ancient governmental state, which existed within the walled cities in the Middle Ages."

Doubtless, the reason for the regulation was to avoid congestion upon the streets and to safeguard the lives of the inhabitants of the village against the stopping and starting of busses. Such legislation falls in the category of local police regulation and, thus, is subject to the limitation of conflict with general laws. Two

¹²³ 108 Ohio St. 245, 140 N.E. 595 (1923).

years later, by a four-to-three vote, the court so classified an ordinance of the city of Nelsonville, which prohibited the operation of any motor busses on any street or avenue "on, or along or over which street car or interurban cars are operated."¹²⁴ The suit was one for an injunction to restrain enforcement of the ordinance. The plaintiffs held a certificate of convenience and necessity issued by the Public Utilities Commission pursuant to the authority granted in Section 614-86, General Code, which provides, in part, that the Commission shall have power "to supervise and regulate each such motor transportation company . . . to prescribe safety regulations, and designate stops for service and safety on established routes." The certificate fixed a bus route through the city. The ordinance, while it did not entirely prohibit motor busses from the use of the streets, so restricted the use of the thoroughfares of the city that the busses were relegated to practically impassable streets. The minority adhered to the local self-government thesis. The majority, however, concluded not only that the police regulation was unreasonable, but also that it was "beyond the letter and spirit of Section 614-86, General Code." The *Perrysburg* case was distinguished by pointing out that it was decided before Section 614-86 became effective and that it did not involve an absolute prohibition of through traffic.

The Village of Bridgeport enacted an ordinance which marked out the limits of the congested traffic district within the village and limited passenger stops within that area by motor vehicles carrying passengers for hire to designated stop zones. This measure was upheld as applied to an interstate carrier which held a certificate of convenience and necessity from the Public Utilities Commission.¹²⁵ The certificate did not purport to designate passenger stops in the village and, thus, there was no clash between it and the ordinance. While the opinion is not entirely clear on the point, the court seems to have regarded the ordinance as an exercise of a power of local self-government. A municipal regulation of traffic looks more like a local police regulation to the writers. This classification would call for no difference in result because there was no conflict with general law.

¹²⁴ *City of Nelsonville v. Ramsey*, 113 Ohio St. 217, 224, 148 N.E. 694, 696 (1925).

¹²⁵ *Eastern Ohio Transport Corp. v. Bridgeport*, 44 Ohio App. 433, 185 N.E. 891 (1932), *petition in error dismissed for want of a debatable constitutional question*, 126 Ohio St. 238, 184 N.E. 852 (1933).

*Sylvania Busses, Inc. v. Toledo*¹²⁶ involved an ordinance of the city of Toledo providing that it should be unlawful for anyone operating an interurban motorbus over the streets of the municipality to carry passengers for hire within the city limits, from one point to another therein, except on such routes as the city should designate and on which there was no community traction company service, either bus or street car. General Code Section 614-86 required that a motor carrier carrying passengers whose complete rides were within one municipality or contiguous municipalities have the consent of the municipality or municipalities. The plaintiff motor transportation company, holding a certificate of convenience and necessity from the Public Utilities Commission, sought an injunction to restrain the enforcement of the ordinance. The ordinance was upheld but the court did not find it necessary to determine whether Article XVIII, Section 3, was alone sufficient authority without benefit of the statute.

The opinions in these cases agreed that a certificate of convenience and necessity was a mere license and did not grant to the carrier any property right in the streets of the municipality. Thus, the various regulations of the municipalities did not take away property rights, although the ordinances were still subject to the rule that they must not be unreasonable or arbitrary. Local situations demand local treatment and it should not be unduly difficult to effect a fair accommodation of local and wider interests in traffic control.

Local licensing legislation of various types has given rise to several interesting "home rule" decisions. In 1927 the Supreme Court was faced with the question whether the city of Cincinnati, in the absence of state legislation upon the subject, had authority to require taxi drivers in the city to furnish insurance or bonds indemnifying themselves against loss from negligent operation.¹²⁷ A non-complying driver sought mandamus to compel the issuance of a license. The court decided that the measure was a valid local police regulation aimed at the protection of the members of the general public in Cincinnati. There was no problem of conflict since there was no general law upon the subject. It was contended

¹²⁶ 118 Ohio St. 187, 160 N.E. 674 (1928); *accord*, *Murphy v. Toledo*, 108 Ohio St. 342, 140 N.E. 626 (1923). A significant current method of traffic regulation is the familiar parking meter. The employment of the device is an exercise of the police power. There is power under Section 3, Article XVIII, to resort to it. *Hines v. City of Bellefontaine*, 74 Ohio App. 393, 57 N.E. 2d 164 (1943).

¹²⁷ *State ex rel. McBride v. Deckebach*, 117 Ohio St. 227, 157 N.E. 758 (1927). An ordinance requiring that motor vehicles operated on the city streets be inspected has been upheld, in the absence of conflicting state regulation of the subject. *Mayer v. Ames*, 133 Ohio St. 458, 14 N.E. 2d 617 (1937).

by the relator that the ordinance had no relation to the public safety since it merely provided for the collection of judgments rendered against taxicab operators. The court rejected this argument, stating that "Proper protection of the public is not limited to prevention of injury. Proper public protection comprehends the taking of measures to make whole members of the public who have suffered injury, and in this broad and legitimate sense this measure would fall within the police power if it applied only to remedies for injury after the occurrence thereof."¹²⁸

A Cleveland ordinance provided that no person under 18 should be permitted to operate an auto upon the streets of the city, and that the owner of an auto should not permit a minor under 18 to operate it upon the city streets. The owner of an automobile, who permitted his seventeen-year old stepson to operate it in violation of the ordinance, was convicted of contributing to the delinquency of a minor.¹²⁹

The boy had a state driver's license. The statute set no age minimum but Section 6296-10, General Code, then provided that "The registrar shall not grant the application of any minor for an operator's license unless such application" was signed by the proper parent, guardian or other person having custody of such minor. Section 6296-11 required an examination to be given before a minor under 18 years of age could receive a license to operate a motor vehicle in the state. The Court of Appeals reversed the judgment of conviction; the ordinance was a local police regulation in conflict with the state driver's license law and was, therefore, invalid. The state license was accorded the effect of affirmatively permitting the licensee to operate a motor vehicle in the state. Thus, Cleveland forbade what the General Assembly allowed.

The municipal establishment of safety zones for the safety of pedestrians and persons boarding street cars and busses has been recognized as a valid local police regulation where there was no question of conflict with general law.¹³⁰ In the same category would fall a requirement that a driver stop before entering a thoroughfare.

*Heidle v. Baldwin*¹³¹ was a personal injury action in which the

¹²⁸ *State ex rel. McBride v. Deckeback*, 117 Ohio St. 227, 233, 157 N.E. 758, 759 (1927). The suggestion made in the opinion that the indemnity requirement had a direct tendency to make drivers more careful and, thus, had an additional police power nexus, would certainly be difficult to document as a matter of human experience. Plaintiff lawyers in negligence cases would like nothing better than to give to juries a chance to draw their own inferences from the requirement.

¹²⁹ *Russo v. State*, 28 Ohio L. Abs. 21, 31 N.E. 2d 102 (Ohio App. 1938); *appeal dismissed for want of a debatable constitutional question*, 134 Ohio St. 510, 17 N.E. 2d 915 (1938).

¹³⁰ *Cleveland v. Gustafson*, 124 Ohio St. 607, 180 N.E. 59 (1932).

¹³¹ 118 Ohio St. 375, 161 N.E. 44 (1928).

plaintiff relied upon an ordinance of the city of Piqua, which, after setting forth a definition of a thoroughfare in terms identical with those contained in Section 6310-28 *et seq.*, now 6307-2, General Code, required drivers of motor vehicles to come to a full stop before entering upon a thoroughfare within the city limits. The code merely gave "vehicles going on main thoroughfares" the right of way over those going on intersecting thoroughfares. The city had erected proper stop signs, and it was alleged that the defendant had failed to observe such a sign, thereby causing an accident and resulting injuries to the plaintiff. The validity of the ordinance was not in issue. It was an additional regulation and was not questioned as a valid exercise of the police power.

The charter of the city of East Cleveland provided that no action should be brought against the city for personal injury, property damage or wrongful death arising or sustained on the streets, avenues, sidewalks, public grounds and other public spaces of the city without first filing with the city commission within 30 days from the time of the alleged injury, damage or wrongful death a statement setting forth the time, place and manner in which it occurred. Failure to file such statement would be deemed a waiver of the cause of action. General Code Section 3714 requires municipalities to keep streets and other public ways open, in repair and free from nuisance. The plaintiff in a personal injury action against the city had not conformed to the charter provision. The provision was declared invalid because it attempted to qualify a duty imposed by general law.¹³² All roads throughout the state, including streets established, improved, and maintained by a municipality at its expense, are public highways of the state. The state may, by general law, devolve control upon local subdivisions and impose duties upon them with respect thereto. That devolution involves use of the local unit to exercise a state power. Thus, the state alone may relieve the local unit of a duty imposed with reference to streets. That, in brief, is the rationalization supporting the decision.

As for Section 3, Article XVIII, the court said:

"The difference between a municipality imposing a condition precedent to the attachment of liability for a breach of duty imposed by general law and wholly refusing to assume such a duty and consequent liability for its breach is one of degree only, and requires the existence and exercise of the same character of power, a police power of its own, superior to the exercised police power of the state, a power which is expressly not granted to municipalities by the Constitution of Ohio."¹³³

¹³² *Wilson v. East Cleveland*, 121 Ohio St. 253, 167 N.E. 892 (1929).

¹³³ *Id.* at 256-257, 167 N.E. at 893.

It will be remembered that in earlier cases, conspicuously the *Froelich*¹³⁴ and *Perrysburg*¹³⁵ cases, it had been broadly declared that the power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, was embraced within the grant of all "powers of local self-government." The opinion in the *Wilson* case cites no cases. It was rested upon general principles and upon them alone.¹³⁶

Nor is it perspicuously clear that the ordinance was in conflict with the statute. The ordinance did not attempt to make the city immune. It merely set up a procedural requirement affecting assertion of a claim. The obvious design of such a provision is to put the city on notice early so that it may be in a satisfactory position to make an investigation and prepare its defense while the event is fresh and witnesses are available. Whether thirty days constituted too short a span for filing the requisite statement was quite another matter; assuming the existence of municipal power, its exercise must be reasonable.

What the decision adds up to is that the state can require our home rule municipalities to maintain their public ways in good repair and support the requirement by a civil sanction of liability in damages not subject to material municipal regulation even as to procedure. While it is unfortunate that the opinion did not refer to the earlier cases and that it is couched in such broad language, it must be granted that there is more than a strictly local interest in the maintenance of public ways in safe condition. This is the more apparent in these times of highly fluid automotive traffic. The sanction of civil liability, moreover, carries us over into what may appropriately be called the domain of private law. Law-making in the area of civil relationships, whether we speak of torts, contracts, or what not, is a power our legislatures have not been wont to devolve upon local bodies and it may seriously be doubted that the Home Rule Amendment should be interpreted to effect such devolution.¹³⁷

In 1919 the Supreme Court laid it down obiter, but unequivocally, that the vacation of a street is a power of local self-government.¹³⁸ In addition to vacation by council action the municipal

¹³⁴ *Froelich v. Cleveland*, 99 Ohio St. 376, 124 N.E. 212 (1919).

¹³⁵ *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595 (1923).

¹³⁶ The *Perrysburg* case related to physical movement over the village streets. That suggests a possible basis of distinction, but we lay little store by it since a statute imposing a duty to repair is actually concerned with the use of streets.

¹³⁷ The subject is discussed more fully elsewhere in this issue of the Journal. Comment, 9 OHIO ST. L.J. 152 (1948).

¹³⁸ See *Froelich v. Cleveland*, 99 Ohio St. 376, 124 N.E. 212, 214 (1919).

code provides an independent method under which a private landowner may proceed in the court of common pleas to have a street or alley vacated.¹³⁹ In a judicial vacation proceeding any owner of property in the immediate vicinity may ask damages and the court may render judgment against the petitioners for damages as it may deem just. The Cincinnati charter required planning commission approval of a proposed vacation subject to power in the council to override the commission by two-thirds vote. Cincinnati contested a judicial vacation proceeding on the ground that vacation is a matter of local self-government and the charter had not been complied with. In a *per curiam* opinion, void of case citations, the court took the position that the statute did not clash with the charter because it furnished lot owners a means of redress in a street vacation, a field of legislation not occupied by the charter.¹⁴⁰ It was stated simply that the city charter provisions were not intended to supersede the statute. Judge Allen dissented upon the ground that the code provision infringed upon the home rule power of local self-government.

It is obvious that city planning will be hampered if streets may be vacated without regard to developed plans and without the concurrence of those officially charged with preserving the integrity of plans. The case does not deny municipal power in the premises. A charter provision could be so drawn as to remove any doubt that all street vacations were subject to the requirement of planning commission approval. That would present the issue squarely.

Public Health and Welfare

In the section upon governmental structure we discussed the subject of health departments. It was seen that they are considered matters of state-wide concern, and, as such, are subject to state control. It was pointed out, however, that the court had doubtless not gone so far as to say that health protection was so completely in an area of exclusive state jurisdiction that municipalities could not act although the legislature had not attempted to place the responsibility in other hands.

Most regulations having to do with public health fall within the second grant of power in Section 3, Article XVIII, as local police, sanitary or similar regulations. We traditionally class legislation having to do with public health, safety and morals as within the police power of the particular governmental unit. The Ohio courts have been quite consistent in following this pattern.

In *Dayton v. Jacobs*¹⁴¹ it was held that it was within the police

¹³⁹ OHIO GEN. CODE §3725 (council action), §3730 (judicial action).

¹⁴⁰ Cincinnati v. Wess, 127 Ohio St. 99, 186 N.E. 855 (1933).

¹⁴¹ 120 Ohio St. 225, 165 N.E. 844 (1929).

power of a municipality, under Section 3 of Article XVIII, to prohibit the sale or exposure for sale of diseased and unwholesome meat within its territory, and, for the accomplishment of such purpose, to provide that, before any meat be sold or offered for sale, it be inspected and approved by a duly constituted officer of the municipality, according to a standard established by such municipality. Such a measure was clearly a public health regulation, and, in the absence of conflict with general law, was allowed to stand as a valid enactment.

*Springfield v. Hurst*¹⁴² involved the validity of an ordinance of the city of Springfield which provided that no one engaged in or connected with the sale of eyeglasses, ophthalmic lenses, eyeglass frames and mountings, should include in any advertisement by newspaper or other means "any statement advertising the price of lenses, or of complete eyeglasses, including lenses, either with or without professional services or credit terms, installment payments or price plans, or the price of any frames or mountings, unless in conjunction therewith the words, 'without lenses,' appear in such manner as to be clearly discernible, or read in such manner as to be clearly understood." The only pertinent statute is Section 1295-31, General Code, which provides, in part, that the State Board of Optometry may revoke, suspend or cancel the certificate of any optometrist found "guilty of fraudulently advertising a price of spectacles or eyeglasses, by cards, circulars, statements or otherwise, with intent to deceive or mislead the public."

The court held that the ordinance was a local police regulation which did not conflict with general laws and which had a substantial relation to public health since it would tend to discourage cut-throat competition, which, in turn, often gives rise to poor quality and poor grinding of lenses in order to allow the articles to be sold at a low advertised price. Three judges dissented on the score of reasonableness.

It is significant that there was no suggestion in the opinions that health protection is a matter of state-wide concern. Perhaps it was thought that the state did not intend to take over the whole field of optometry, including the sale of eyeglasses. Certainly it is plain that the case is not consistent with any idea that health protection is an area of exclusive state jurisdiction.

Examples of the adoption of local police regulations to cover specific problems in the community are, of course, numerous. An ordinance setting one pound as the standard weight of any loaf of bread to be sold in the city, but allowing heavier loaves to be sold if properly labeled, has been upheld as a valid exercise of local police power in the absence of any general law in force upon the

¹⁴² 144 Ohio St. 49, 56 N.E. 2d 185 (1944).

subject at that time.¹⁴³ Home rule power includes enactment of local police regulations designed to prevent fraud and imposition as well as to preserve life, health, good order and decency.

In *Greenberg v. Cleveland*¹⁴⁴ an ordinance which made attempts to steal and take anything from the person of another by violence, force or putting in fear, a misdemeanor, was upheld. Pocket-picking was made an offense by statute but attempts were not covered. The court did not rest simply upon the absence of conflict. It was broadly laid down that a statute creating the same offense as the ordinance could not be exclusive even if the legislature expressly forbade municipal legislation on the subject.

A municipal ordinance proscribing the sale or offers for sale of papers, periodicals or other publications containing horse racing news or tips has been upheld as a valid exercise of police power.¹⁴⁵ Again no general law was cited to bring up the problem of conflict. The fact that such publications as were covered by the ordinance tended to incite gambling or betting on horse races made them a proper subject for police regulation and overrode the argument of the defendant that the ordinance violated freedom of speech and press. Municipal proscription of slot machines the return from which is governed by chance is, likewise, within the home rule grant.¹⁴⁶

To prevent fraud in the auctioning of jewelry, a municipal ordinance of the city of Cleveland provided that no jewelry should be sold at auction in the city for a greater period than sixty days in one year and that an auctioneer of jewelry must have been a resident of the city for one year and have had a regular stock of jewelry for six months of that year. General Code Section 5868 provided for the state licensing of persons to sell goods (in general) at auction for one year. A licensee under the statute sought to enjoin enforcement of the ordinance.¹⁴⁷ The ordinance withstood his attack. The local police power was considered broad enough to ground measures directed to the financial as well as the physical safety of the public. There was no conflict, moreover, with Section 5868, General Code, since the statute was a general measure which

¹⁴³ *Allion v. Toledo*, 99 Ohio St. 416, 124 N.E. 237 (1919).

¹⁴⁴ 98 Ohio St. 282, 120 N.E. 829 (1918).

¹⁴⁵ *Solomon v. Cleveland*, 26 Ohio App. 19, 159 N.E. 121 (1926).

¹⁴⁶ *Myers v. Cincinnati*, 128 Ohio St. 235, 190 N.E. 569 (1934); *Zelles v. Matowitz*, 22 Ohio Op. 261 (Ohio App. 1941), *appeal dismissed for want of a debatable constitutional question*, 139 Ohio St. 627, 49 N.E. 2d 945 (1942). A slot machine may be treated as a gambling device per se even though designed for lawful operation. If banned by general law, an ordinance authorizing the licensing of such a machine will not stand up. *Kraus v. Cleveland* 135 Ohio St. 43, 19 N.E. 2d 159 (1939).

¹⁴⁷ *Holsman v. Thomas*, 112 Ohio St. 397, 147 N.E. 750 (1925).

did not specifically govern sales of particular classes of goods at auction.

In 1935, by a five-to-two vote, the Supreme Court sustained a Zanesville ordinance regulating the hours during which a barber shop could remain open as a valid exercise of the police power under Section 3 of Article XVIII, since barber shops are closely connected with the public health and safety.¹⁴⁸ There was no general law regulating barber shop hours. Eight years later a similar Cincinnati ordinance was invalidated and the *Zanesville* case was squarely overruled.¹⁴⁹ This time the vote was four to three. Section 34 of Article II of the Constitution authorizes "laws" fixing and regulating the hours of labor. None of the judges in either case questioned the proposition that "laws" meant enactments of the legislature and did not embrace municipal ordinances. The question was whether the ordinances were valid exercises of power under the second grant of Section 3 of Article XVIII. It is a fair guess that the ordinances in both cases were sponsored by regular day-time barbers who wanted to eliminate competition by chain or other shops operated at night. The majority in the *Zanesville* case thought that the ordinance was valid viewed in terms either of its relation to the health and welfare of those served by barbers or of its relation to the welfare of the barbers themselves. They thought there was substance to the idea that the ordinance was really a regulation of working hours, that "fixing the hours the shop shall remain open may be to the legislative mind the only effective way to regulate hours of labor in this trade." The dissenters insisted that the ordinance was arbitrary, in any event, but that, were it to be deemed a regulation of hours of labor, it would be invalid because the legislature is given exclusive authority over that subject by Section 34 of Article II. Judge Jones assumed that an hour-fixing measure was not an exercise of police power. This assumption was also made in the majority opinion in the *Cincinnati* case. Judge Bell declared there that the ordinance served no other purpose than the fixing of working hours.¹⁵⁰

A very persuasive argument can be made that the ordinances in these cases were essentially regulations of hours of labor and that the constitution gave the General Assembly exclusive legislative jurisdiction in that area. It does not help, however, to say that such regulation is not an exercise of police power. The contrary appears to be true beyond serious argument. The point is that state authority in this area of the police power is considered exclusive because of the specific grant of power in the constitution.

¹⁴⁸ *Wilson v. Zanesville*, 130 Ohio St. 286, 199 N.E. 187 (1935).

¹⁴⁹ *Cincinnati v. Correll*, 141 Ohio St. 535, 49 N.E. 2d 412 (1943).

¹⁵⁰ *Id.* at 543, 49 N.E. 2d at 416.

Child welfare was treated in *Ferrie v. Sweeney*,¹⁵¹ a *nisi prius* case, as a matter of state-wide concern and an ordinance of the city of Cleveland which appropriated money to support day care centers for children of working mothers without regard to financial need was held invalid. The court held that the legislature in enacting Sections 3070-1 to 3070-35, inclusive, General Code, setting up county child welfare boards throughout the state and defining their power and duties, "has clearly evidenced its intention to occupy the entire field of child welfare." This sounds like pre-emption and, if so, the field would be closed to the municipalities. The court held that the matter was not a power of local self-government and that the ordinance was contrary to the spirit and purpose of the child welfare act, since it proposed to give aid to children indiscriminately while the state laws set up the requirement of need as a prerequisite to assistance.

Thus, in the matter of public health and welfare, the cases seem to boil down to the proposition that where the state has set up some machinery for governing the problem, such as health districts and the child welfare boards, the subject is a state-wide concern and lies beyond municipal power. But where the state has set up no such machinery and the problem is deemed appropriate for municipal action, they will look to the second grant of power in Section 3, Article XVIII, and treat the local measure as a local police, sanitary or other similar regulation.

Perhaps, the correct theory is that the municipalities may act until the state pre-empts the field. Yet, it seems that pre-emption could be accomplished short of the establishment of health districts, departments and boards. It may be doubted that health and welfare measures are purely state affairs, whatever that may be. Would it not, therefore, be a strongly supportable position to say here that the "conflicts" test of Section 3, Article XVIII, is the true guide? The state could control any matter of public health by enacting proper legislation thereon, while municipalities could supplement the statutes with local legislation to meet their own problems. The state law would, in effect, set up the minimum requirements, while local legislation could be directed at the special phases of health protection which prevail within the municipal limits.

Planning and Zoning

Comprehensive urban zoning was sustained by Ohio's highest court in *Pritz v. Messer*¹⁵² a year before it successfully met the constitutional test in the Supreme Court of the United States in the famous Ohio-born case of *Village of Euclid v. Ambler Realty*

¹⁵¹ 34 Ohio Op. 272, 72 N.E. 2d 128 (1946).

¹⁵² 112 Ohio St. 628, 149 N.E. 30 (1925).

Co.¹⁵³ The Ohio court concluded that the ordinance before it was a valid exercise of the police power. The opinion, however, described zoning as "a function of local self-government." Since there was an enabling statute,¹⁵⁴ which granted zoning powers to municipalities, the point was made that a municipality is "doubly empowered" to legislate on the subject. If there is power to zone flowing directly through the constitution to a municipality, it is not evident what a statute can add. It would appear, moreover, that since zoning is pretty clearly an exercise of police power it falls within the second grant of Section 3 of Article XVIII¹⁵⁵

Perhaps the *Pritz* case is sufficient explanation for the opinion in a recent Court of Appeals case in which a zoning ordinance prevailed over a State Board of Liquor Control permit to manufacture wine in a residence zone.¹⁵⁶ The majority stressed the prior enactment of the ordinance and declared that the city's authority to zone was at least commensurate with the power of the Board to issue the permit. The dissenting judge perceived a square conflict and concluded that the Liquor Control Act, under which the permit was issued, overrode the local police regulation.

Planning is a function of local self-government and a home rule charter may make appropriate provision for a planning commission and otherwise for the conduct of planning activities.¹⁵⁷

Schools and Libraries

It is well settled in Ohio that the control and maintenance of our common schools rests exclusively in the General Assembly. The leading case upon this subject for present purposes, is *Niehaus v. State ex rel. Board of Education*.¹⁵⁸ In that case the building inspector of the city of Dayton refused to issue a building permit to the board of education of the city school district because the board had not paid a fee required by an ordinance governing the issuance of such permits. The board of education relied upon Sections 1031 and 1035, General Code, which provide that the chief inspector of workshops shall cause to be inspected all school houses to determine the safety of construction and health facilities, and that after such inspection, if satisfactory, "the plans for the erection of such structure . . . shall be approved by the inspectors of workshops and factories, except in municipalities having regularly

¹⁵³ 272 U.S. 365 (1926).

¹⁵⁴ OHIO GEN. CODE §4366-1 *et seq.*

¹⁵⁵ It was so classified in *Bauman v. State ex rel. Underwood*, 122 Ohio St. 269, 171 N.E. 336 (1930).

¹⁵⁶ *Carnabuci v. City of Norwalk*, 70 Ohio App. 429, 46 N.E. 2d 773 (1942).

¹⁵⁷ *State ex rel. Bateman v. Zachritz*, 135 Ohio St. 580, 22 N.E. 2d 84 (1939).

¹⁵⁸ 111 Ohio St. 47, 144 N.E. 433 (1924).

organized building inspection departments, in which case the plans shall be approved by such department." The city of Dayton had established a building inspection department.

The court determined that the fee could not be exacted since "The only constitutional concession of power to municipalities with reference to public schools is a provision that municipalities that have attained to the classification of a city shall have power to determine by a referendum vote the number of members of the school board of the district situated wholly or partly within the city."¹⁵⁹ As to all other power, including the power of a municipality to approve plans for the erection of a public school building, the legislature has exclusive authority and municipalities have only such power as is granted to them by the legislature. Since the legislature granted only the power to approve the plans for the erection of a school building and did not grant the power to impose a fee for the performance of that duty, the municipality was without authority to establish such a requirement.

The source of the state's power as to schools is Section 7, Article I, and Sections 2 and 3, Article VI, of the constitution. Section 7, Article I, provides that, "it shall be the duty of the General Assembly to pass suitable laws . . . to encourage schools and the means of instruction." Section 2, Article VI, ordains that the General Assembly shall make adequate tax provision to secure a thorough and efficient system of common schools throughout the state. Section 3, Article VI, reads in part: "Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds." From these provisions it is fairly evident that public education lies in an area of state jurisdiction beyond the reach of home rule powers.¹⁶⁰

The charter of Columbus made provision for free public libraries to be administered by a board of trustees to be appointed by the mayor. The board was authorized to operate the public library system and to extend it. There was no limitation upon extension inconsistent with provision of library service to inhabitants of the county residing beyond the city limits. By statute a municipal public library board could participate in certain classified property taxes collected by the county on condition that it

¹⁵⁹ *Id.* at 54, 144 N.E. at 435.

¹⁶⁰ Conversely, however, state control over schools does not permit invasion of the home rule domain. Thus, the Supreme Court has declared unconstitutional a statutory provision for free water from a municipal waterworks for the public schools. The statute clashed with Section 4, Article XVIII, of the constitution. *Board of Education of City School District of Columbus v. City of Columbus*, 118 Ohio St. 295, 160 N.E. 902 (1928).

extended service to people in the county living outside the municipality. The Columbus board took steps to qualify under the act. In mandamus to compel the county treasurer to honor a warrant drawing on the board's asserted share of the funds available under the act it was held that the statute applied and the writ was allowed.¹⁶¹ The question whether by home rule charter provision the state could be barred from employing a municipal library to serve people in the rest of the county was posed in the opinion but left unanswered since the statutory scheme was consistent with the Columbus Charter. The educational character of free public libraries was noted, however, and it is a fair guess that were the posed question fairly presented the charter provision would give way. The state-concern concept could very easily be employed here.

Sanctions

Section 3628, General Code, empowers municipalities "to make the violation of ordinances a misdemeanor, and to provide for the punishment thereof by fine or imprisonment, or both, but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months." It antedates the Home Rule Amendment. A strong dictum from the pen of Chief Justice Marshall put aside the limitations of the section as ineffective restraints upon local police power.¹⁶² The non-conflict clause did not apply because it has reference to conflict with a general law prescribing a rule of conduct on the same subject matter as a local measure. A limitation on municipal law-making is not such a general law. If "conflict" could be created by statutory prohibition of or limitation upon the adoption of municipal police regulations, the legislature could, by a simple "no," destroy the second grant of power under Section 3 of Article XVIII.

How far does municipal freedom in prescribing penal sanctions go? We do not know of any principle to provide clear guidance in drawing a line. While it can be asserted with safety that a municipality does not have home rule power to define and punish serious crimes, such as arson and murder, the felony concept does not solve our problem because an offense may be punishable by a very heavy fine and yet not be a felony. There are, however, the broad limitations of appropriateness and reasonableness. There must, we take it, be a rational nexus between the regulation or prohibition and municipal functions and objectives. A penalty, moreover, which was entirely out of line with the offense would be subject to the charge of arbitrariness.

¹⁶¹ State *ex rel.* Brickell v. Frank, 129 Ohio St. 604, 196 N.E. 416 (1935).

¹⁶² See Youngstown v. Evans, 121 Ohio St. 342, 346, 168 N.E. 844, 845 (1929).

Territorial Changes, Merger, Consolidation and Dissolution

The village of Brook Park sought to enjoin completion of proceedings under general law to detach some of its territory and annex it to the contiguous city of Cleveland. The village relied, in part, upon the ground that the proceeding invaded its home rule powers. The Common Pleas Court rejected this contention. Judge Orr observed that there must be some method of effecting territorial changes and labeled the subject a state-wide concern.¹⁶³ That was in 1943. The writers have found no other Ohio case bearing even mention of the question.

The whole province of annexation, disannexation, merger, consolidation and dissolution doubtless lies beyond the reach of home rule powers. The Home Rule Amendment is silent as to all of these matters. All but dissolution involve elements which transcend a particular municipality.

Provision for original incorporation is expressly left in state hands. Is not the question whether municipal existence will be continued also under state control? Home rule powers are granted to municipalities. It would seem that they presuppose continued existence and do not embrace self-destruction.

Extraterritoriality

Extraterritorial powers with respect to the acquisition and operation of municipal utilities are expressly granted by Sections 4 and 6 of Article XVIII.¹⁶⁴ Section 3, on the other hand, grants (1) all powers of local self-government without specific reference to the territorial factor and (2) power to adopt and enforce "within their limits" local police, and the like, regulations. Were the question presented we have no doubt but that it would be decided that a municipality could not directly cross its corporate limits under either grant. This means that extraterritorial powers depend upon legislative devolution. Does the Home Rule Amendment itself limit the General Assembly in any wise in delegating such powers? Certainly there is nothing in the first grant of Section 3 to suggest any limitation. As to the second there is a decision of the Supreme Court of the State of Washington which has disturbing implications. Section 11 of Article XI of the constitution of that state has a clause like the second grant of Section 3 of Ohio's Article XVIII. The Washington court decided that the words "within its limits" was an all-embracing limitation which precluded the legislature from devolving upon a municipality extraterritorial police power with respect to protection of a water supply.¹⁶⁵ As the writers see

¹⁶³ Village of Brook Park v. Cleveland, 26 Ohio Op. 536 (1943).

¹⁶⁴ Home rule powers in relation to utilities are discussed elsewhere in this issue of the Journal. See Comment, 9 OHIO ST. L.J. 141 (1948).

¹⁶⁵ Brown v. Cle Elum, 145 Wash. 588, 261 Pac. 112 (1927). Fullerton, J., dissented.

the problem, the quoted words merely mark the bounds of the direct constitutional grant of power; they do not refer to the powers of the legislature, to its broad responsibility so to distribute authority within the constitutional framework as to get the business of government done. Ohio should not look with favor upon the Washington interpretation.

Functional Consolidation

What has been said concerning extraterritoriality is pertinent here. The County Home Rule Amendment covers the subject in small part;¹⁶⁸ otherwise the matter appears to depend upon enabling legislation.

CONCLUSION

The experience of Ohio with municipal home rule has been a rather unhappy business.

The Home Rule Amendment was not well-conceived in the first place. There is ample evidence in the Proceedings and Debates of the Constitutional Convention that much confusion existed in the minds of the delegates. When they did not clearly tie the availability of substantive home rule powers to the adjective process of charter-making they left a mass of legal problems in their wake. They did not give a municipality a clean choice between operating under general law and on a home rule footing. While the real crux of the home rule problem is the larger municipalities, home rule powers were granted to all cities and villages without regard to size. The grant of "all powers of local self-government" was just as vague and difficult to apply as the much-criticized California provision with respect to "municipal affairs." A rigid city-village classification borrowed from the Municipal Code of 1902 was frozen into the organic law.

We have met with something less than indifferent success in applying the Home Rule Amendment. This is due in part to the inherent difficulty of the task and in part to public apathy and the inadequacy of the efforts of the bar in handling home rule questions in the courts. Local responsibility for the conduct of public affairs at the local level is a fundamental political value in the American scheme of things. Home rule has been employed to assure municipalities this responsibility free from legislative interference, on the

¹⁶⁸ OHIO CONST. Art. X, §§ 1, 3 and 4.

The Attorney General has ruled that a municipality has home rule power to provide supervision for recreational activities by a cooperative agreement with the local board of education. 1945 OPS. ATT'Y GEN. (Ohio) No. 253, p. 245.

In the area of federal-local relations he has found authority in Section 3, Article XVIII, for a municipal agreement with the Federal Government under which the latter was to provide emergency post-war housing for veterans and the city to provide certain facilities and manage the project. (1946) OPS. ATT'Y GEN. (Ohio) No. 932, p. 311.

one hand, and from the necessity for seeking all their authority from the legislature, on the other. The difficulty has been that we have used a vague political concept as a formula for distributing power between the state and municipalities and have distributed governmental power on the basis of a very artificial geographical pattern. This rigidity has been at the expense of highly desirable flexibility and adaptability in governmental arrangements. Urban growth is outward. While population in the older parts of many cities is actually on the decline, our cities have, in social and economic fact, swarmed over their boundaries. Home rule, as we have known it in Ohio, stops at the corporate limits, yet community development is taking place in the vital urban fringe. Municipal power, then, stops at a line which has little relation to the true scope of urban problems. Nor does home rule, as presently conceived, contribute to the adjustment of our complex problems of intergovernmental relationships.

Vagaries in judicial interpretation of the Home Rule Amendment lie as much at the door of the bar as that of the courts. Local Government Law is a subject which has far from attracted maximum lawyer interest. Perhaps the law schools are really ultimately at fault for not having given this important subject the attention it merits.

There will, of course, be an opportunity in 1952 to reopen the whole subject of home rule and state-local relations. It is hoped that the electors will decide at that time in favor of calling a convention, under Section 3, Article XVI of the Ohio Constitution, to revise, alter or amend that instrument. If so, home rule should be thoroughly re-examined on a sweeping local government context not confined to municipalities. If the people and the delegates do not trust the General Assembly to preserve local autonomy, the constitutional scheme developed to achieve that end should somehow be made to assure sufficient flexibility to enable us to get the over-all job of government in Ohio done well by effective use of the powers and governmental machinery available.